

# Civil Procedure

with Limitation Act, 1963

C.K. TAKWANI

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## Abbreviations

AC	Appeal Cases
AIR	All India Reporter
ALJ/All LJ	Allahabad Law Journal
AER/All ER	All England Law Reports
BLR/Bom LR	Bombay Law Reporter
Ben LR	Bengal Law Reporter
CP	Carrington & Payne
CWN/Cal WN	Calcutta Weekly Notes
CLJ/Cal LJ	Calcutta Law Journal
Ch D	Law Reports (English) Chancery Division
Cri LJ	Criminal Law Journal
CLT/Cut LT	Cuttack Law Times
Guj CD	Gujarat Current Decisions
GLH/Guj LH	Gujarat Law Herald
GLR/Guj LR	Gujarat Law Reporter
IA	Law Reports Indian Appeals (Privy Council)
IC	Indian Cases
ILR	Indian Law Reports
KLT/Ker LT	Kerala Law Times
KB/KBD	Law Reports (English) Kings Bench
MIA	Moore's Indian Appeals
MLJ/Mad LJ	Madras Law Journal
QB/QBD	Law Reports (English) Queens Bench Division
RCJ	All India Rent Control Journal
RLW/Raj LW	Rajasthan Law Weekly
SCC	Supreme Court Cases
SCC (L&S)	Supreme Court Cases (Labour & Services)
SCR	Supreme Court Reports
WLR	Weekly Law Reports
WR	Weekly Reporter



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Part I  
Preliminary



# CHAPTER 1

## Introduction

### SYNOPSIS

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### 1. PROCEDURAL LAW

Laws can be divided into two groups: (1) Substantive law, and (2) Adjective or procedural law. Whereas substantive law determines rights and liabilities of parties, adjective or procedural law prescribes the practice, procedure and machinery for the enforcement of those rights and liabilities.<sup>1</sup>

In *Halsbury's Laws of England*, it has been stated,

"There is at the outset a vital and essential distinction between substantive law and procedural law. The function of substantive law is to define, create or confer substantive legal rights or legal status or to impose and define the nature and extent of legal duties. The function of procedural law is to provide the machinery or the manner in which the legal rights or status and legal duties may be enforced or recognised by a court of law or other recognised or properly constituted tribunal."<sup>2</sup>

Procedural laws prescribe procedure for the enforcement of rights and liabilities. The efficacy of substantive laws, to a large extent, depends upon the quality of procedural laws. Unless the procedure is simple, expeditious and inexpensive, substantive laws, however good are bound to fail in achieving their object and reaching the goal.

1. See also, Glanville Williams, *Learning the Law* (1982) at pp. 19-13; Law Commission's Fifty-fourth Report at p. 18.
2. *Halsbury's Laws of England* (4th Edn.) Vol. 37 at pp. 18-19, para 10.

Procedural law is thus an adjunct or an accessory to substantive law. The two branches are complementary to each other and interdependent, and the interplay between them often conceals what is substantive law and what is procedural law. It is procedural law which puts life into substantive law by providing a remedy and implements the well-known maxim *ubi jus ibi remedium*.<sup>3</sup>

The Indian Contract Act, the Transfer of Property Act, the Industrial Disputes Act, the Indian Penal Code are instances of substantive law, while the Indian Evidence Act, the Limitation Act, the Code of Civil Procedure, the Code of Criminal Procedure are instances of procedural law.

The Code of Civil Procedure is an adjective law. It neither creates nor takes away any right. It is intended to regulate the procedure to be followed by civil courts.<sup>4</sup>

## 2. HISTORY OF THE CODE

Before 1859, there was no uniform Code of Civil Procedure. There were different systems of civil procedure in different parts of the country. The first uniform Code of Civil Procedure was enacted in 1859. But that Code was also not made applicable to the Supreme Courts in the Presidency Towns and to the Presidency Small Cause Courts. Some amendments were made therein and the Code was applied to the whole of British India, but there were many defects in it, and therefore, a new Code was enacted in 1877. Again, another Code was enacted in 1882, which was also amended from time to time.

In 1908, the present Code of Civil Procedure was enacted. It was amended by two important Amendment Acts of 1951 and 1956. On the whole, this Code worked satisfactorily, though there were some defects in it. The Law Commission in its various reports made many recommendations, and after carefully considering them, the Government decided to bring forward the Bill for the amendment of the Code of Civil Procedure, 1908, keeping in view, *inter alia*, the following considerations:<sup>5</sup>

- (1) a litigant should get a fair trial in accordance with the accepted principles of natural justice;
- (2) every effort should be made to expedite the disposal of civil suits and proceedings, so that justice may not be delayed;
- (3) the procedure should not be complicated, and should, to the utmost extent possible, ensure a fair deal to the poorer sections of

3 *Ibid* at p. 11 para 3

4 *Ghanshyam Dass v. Dominion of India*, (1984) 3 SCC 46 at p. 56 AIR 1984 SC 1014 at p. 1019

5 Statement of Objects and Reasons of Amendment Act 104 of 1976

the community who do not have the means to engage a pleader to defend their cases.

Some of the important changes made by the Amendment Act, 1976 are as under:

- (i) The doctrine of *res judicata* is being made more effective.
- (ii) Power to transfer proceedings from one High Court to another is given to the Supreme Court
- (iii) Freedom from attachment of a portion of salary to all salaried employees, is granted.
- (iv) Provision of giving notice under Section 80 before the institution of a suit against the Government or a public officer is made less stringent.
- (v) Restrictions are imposed on the right of appeal and revision.
- (vi) Provisions are being made to ensure that written statements and documents were filed without delay.
- (vii) New Order 32-A has been inserted to provide a special procedure in litigation concerning the affairs of a family.
- (viii) The practice to pass preliminary and final decree in certain suits is abolished.
- (ix) Scope of Summary Trials is substantially widened.
- (x) Important changes have been made to provide relief to poorer sections of the community.

The amendments made in 1976 were not found sufficient. With a view to dispose of civil cases expeditiously, Justice Malimath Committee was appointed by the Government. In pursuance of recommendations of the Committee, the Code was amended by the Amendment Acts of 1999<sup>6</sup> and 2002.<sup>7</sup>

Important amendments made by Acts of 1999 and 2002 may be summarised thus:

- (i) In several matters, such as issuing of summons, filing of written statement, amendment of pleadings, production of documents, examination of witnesses, pronouncement of judgments, preparation of decree, etc., a time-limit is prescribed;
- (ii) A new provision for settlement of disputes outside the court has been introduced;
- (iii) Number of adjournments have been restricted;
- (iv) A provision for recording of evidence by the Court Commissioner has been made;
- (v) Endless arguments are sought to be shortened by (a) empowering the court to fix a time-limit for oral arguments; and (b) by

6. Act 46 of 1999.

7. Act 22 of 2002.

permitting written arguments to be placed on record by the parties;

- (vi) A provision is made for filing of appeal in the court which passed the decree;
- (vii) Instituting of appeal against the judgment is allowed where the decree is not drawn up;
- (viii) Scope of First Appeal, Second Appeal, Letters Patent Appeal and Revision has been curtailed.

### 3. COMMENCEMENT

The Code of Civil Procedure, 1908 (5 of 1908) came into force with effect from 1 January 1909; while the Amendment Act (104 of 1976) came into force with effect from 1 February 1977. It may be stated that the Code of Civil Procedure (Amendment) Bill, 1974 was passed by Parliament on 23 August 1976. It received the assent of the President on 9 September 1976. It became Act 104 of 1976 and came into force from 1 February 1977 (except Sections 12, 13 and 50). Sections 12 and 50 came into force on 1 May 1977 and Section 13 came into force on 1 July 1977.

The Code of Civil Procedure (Amendment) Act, 1999 received the assent of the President on 30 December 1999 and came into force from 1 July 2002. The Code of Civil Procedure (Amendment) Act, 2002 received the assent of the President on 23 May 2002 and came into force on 1 July 2002.

### 4. CONSOLIDATION AND CODIFICATION

The Preamble of the Code states that the object of the Code is to consolidate and amend the laws relating to the procedure of Courts of Civil Judicature. To consolidate means to collect all the laws relating to a particular subject and to bring it down to date in order that it may form a useful Code applicable to the circumstances existing at the time when the consolidating Act is enacted.<sup>8</sup>

The very object of codifying a particular branch of law is that, on any point specifically dealt with, the law should thenceforth be ascertained from the language used in that enactment and not from the preceding Act.<sup>9</sup>

The Code of Civil Procedure is a consolidated Code as to procedure to be followed by civil courts. As observed in *Prem Lala Nahata Chandi*

8 *Administrator General of Bengal v Prem Lal Mullick*, (1894-95) 22 IA 107 11 R (1895) 22 Cal 788 (PC), *Mahant Shantha Nand v Mahant Basudevanand*, AIR 1930 All 225 at p 230 (FB).

9 *Narendra Nath Sircar v Kamalbasini Das* (1895-96) 23 IA 18 11 R (1896) 23 Cal 563 (PC), *Gulabchand v Kudilal Govindram*, AIR 1951 MB 1 (FB).

Prasad Sikaria<sup>10</sup>, the Code consolidates and amends the laws relating to the procedure of the Courts of Civil Judicature. No doubt it also deals with certain substantive rights. But its essential object is to consolidate the law relating to civil procedure.

## 5. EXTENT AND APPLICABILITY

The Code extends to the whole of India, except (a) the State of Jammu and Kashmir; and (b) the State of Nagaland and the Tribal Areas. It also extends to the Amindivi Islands and the East Godavari and Vishakhapatnam Agencies in the State of Andhra Pradesh and the Union Territory of Lakshadweep. By the Amendment Act of 1976, the application of the provisions of the Code have been extended to Schedule Areas also.<sup>11</sup>

## 6. OBJECT OF THE CODE

The object of the Code is to consolidate and amend the laws relating to the procedure of Courts of Civil Judicature. It is a consolidated Code collecting all the laws relating to the procedure to be adopted by civil courts. It is designed to facilitate justice and further its ends and is not a penal enactment for punishments and penalties, not a thing designed to trip up people.<sup>12</sup> Too technical a construction of sections which leaves no room for reasonable elasticity of interpretation should, therefore, be guarded against, provided that justice is done to both the sides.<sup>13</sup> The provisions of the Code, therefore, should be construed liberally and technical objections should not be allowed to defeat substantial justice.<sup>14</sup> A "hypertechnical view"<sup>15</sup> should be avoided by the court.

As the Supreme Court stated, "A procedural law is always in aid of justice, not in contradiction or to defeat the very object which is sought to be achieved. A procedural law is always subservient to the substantive law. Nothing can be given by a procedural law what is not sought to be given by a substantive law and nothing can be taken away by the procedural law what is given by the substantive law."<sup>16</sup> (emphasis supplied)

10. (2007) 2 SCC 551: AIR 2007 SC 1247.

11. S. 1; see also, Ss. 157, 158.

12. *Sangram Singh v. Election Tribunal*, AIR 1955 SC 425 at p. 429; (1955) 2 SCR 1 at p. 5; *Chinnammal v. P. Arumugham*, (1990) 1 SCC 513 at p. 520; AIR 1990 SC 1828 at p. 1833.

13. *Ibid.*

14. *Hukum Chand Boid v. Kamalanand Singh*, ILR (1906) 33 Cal 927.

15. *Ganesh Trading Co. v. Moji Ram*, (1978) 2 SCC 91 at p. 96. AIR 1978 SC 484 at p. 488; *Babu Lal v. Hazari Lal*, (1982) 1 SCC 525 at p. 539; AIR 1982 SC 818 at p. 826.

16. *Saiyad Mohd. Bakar v. Abdulhabib Hasan*, (1998) 4 SCC 343 at p. 349. AIR 1998 SC 1624 at p. 1627.

## 7. SCOPE: CODE NOT EXHAUSTIVE

The Code is exhaustive on matters specifically dealt with by it.<sup>17</sup> However, it is not exhaustive on the points not specifically dealt with therein.<sup>18</sup> The legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing procedure for them.<sup>19</sup> With regard to those matters, the court has inherent power to act according to the principles of justice, equity and good conscience.<sup>20</sup> The Code specifically provides that, "Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."<sup>21</sup>

## 8. INTERPRETATION

Though substantive laws are very important, value and importance of procedural laws cannot be underestimated. But the procedural law must be regarded as such. The function of adjective law is to facilitate justice and further its ends.<sup>22</sup> The rules of procedure are intended to be a handmaid to the administration of justice and they must, therefore, be construed liberally and in such manner as to render the enforcement of substantive rights effective.<sup>23</sup> A "hypertechnical view" should not be adopted by the court in interpreting procedural laws.<sup>24</sup> A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure.<sup>25</sup>

17. *Manohar Lal Chopra v. Seth Hiralal*, AIR 1962 SC 527; 1962 Supp (1) SCR 450; *Padam Sen v. State of U.P.*, AIR 1961 SC 218; (1961) 1 SCR 884.

18. *Ibid.* 19. *Ibid.*

20. *Hukum Chand Boid v. Kamalanand Singh*, ILR (1906) 33 Cal 927.

21. S 151. For detailed discussion, see, *infra*, Pt V, Chap. 4.

22. *Hukum Chand Boid v. Kamalanand Singh*, ILR (1906) 33 Cal 927, *Sangram Singh v Election Tribunal*, AIR 1955 SC 425 at p. 429 (1955) 2 SCR 1 at p. 5, *Manharlal v State of Maharashtra*, (1971) 2 SCC 119 at pp. 124-25; AIR 1971 SC 1511 at pp. 1515-16, *Shreenath v. Rajesh*, (1998) 4 SCC 543; AIR 1998 SC 182.

23. *Jai Jai Ram Manohar Lal v. National Building Material Supply*, (1969) 1 SCC 869 at p 871; AIR 1969 SC 1267 at p. 1269, *Babu Lal v Hazari Lal*, (1982) 1 SCC 525 at p 539 AIR 1982 SC 818 at p 826; *Deena v. Union of India*, (1983) 4 SCC 645 at pp 679-80 AIR 1983 SC 1155 at p 1180, *CST v Auraiya Chamber of Commerce*, (1986) 3 SCC 50 at p 61 AIR 1986 SC 1556, *Chinnammal v. P Arumugham*, (1990) 1 SCC 513 at p 520 AIR 1990 SC 1828 at p. 1833; *Sardar Amarjit Singh v. Pramod Gupta*, (2003) 3 SCC 272, *N Baaji v. Virendra Singh*, (2004) 8 SCC 312; *Prem Lala Nahata v. Chand Prasad Sikaria*, (2007) 2 SCC 551; AIR 2007 SC 1247.

24. *Ganesh Trading Co v. Mohi Ram*, (1978) 2 SCC 91 at p 96 AIR 1978 SC 484 at p 488. *N T Veluswami v. G Raja Namar*, AIR 1959 SC 422 at p 426 1959 Supp (1) SCR 623

25. *Jai Jai Ram Manohar Lal v. National Building Material Supply*, (1969) 1 SCC 869 at p 871 AIR 1969 SC 1267 at p 1269 see also *K C Kapoor v Radhika Devi* (1981) 4 SCC 487 at p 499 AIR 1981 SC 2118, *Kalpada Das v Bimal Krishna*, (1983) 1 SCC 14 at p 16-17 AIR 1983 SC 876, *Bhagwan Dass Arora v ADJ*, (1983) 4 SCC 1 at p 6 AIR

"Rules of pleadings are intended as aids for a fair trial and for reaching a just decision. An action at law should not be equated to a game of chess. Provisions of law are not mere formulae to be observed as rituals. Beneath the words of a provision of law, generally speaking, there lies a juristic principle. It is the duty of the Court to ascertain that principle and implement it."<sup>26</sup> Our laws of procedure are based on the principle that, as far as possible, no proceeding in a court of law should be allowed to be defeated on mere technicalities. The provisions of the Code of Civil Procedure, therefore, must be interpreted in a manner so as to subserve and advance the cause of justice rather than to defeat it.<sup>27</sup>

The principle underlying interpretation of procedural laws has been succinctly laid down by the Supreme Court in the case of *State of Punjab v. Shamlal Murari*<sup>28</sup>, wherein, speaking for the Court, Krishna Iyer, J. observed:

"We must always remember that processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. Where the non-compliance, though procedural, will thwart fair hearing or prejudice doing of justice to parties, the rule is mandatory. But, grammar apart, if the breach can be corrected without injury to a just disposal of the case, we should not enthrone a regulatory requirement into a dominant desideratum. *After all, courts are to do justice, not to wreck this end product of technicalities.*"<sup>29</sup>

(emphasis supplied)

## 9. SCHEME OF THE CODE

The Code can be divided into two parts: (i) the body of the Code containing 158 sections; and (ii) the (First) Schedule, containing 51 Orders and

1983 SC 954 at pp. 956-57, *Harcharan v. State of Haryana*, (1982) 3 SCC 408 at pp. 411-12. AIR 1983 SC 43 at p. 45, *CST v. Auraiya Chamber of Commerce*, (1986) 3 SCC 50; AIR 1986 SC 1556.

26. *Raj Narain v. Indira Nehru Gandhi*, (1972) 3 SCC 850 at p. 858; AIR 1972 SC 1302 at p. 1307.

27. *Ghanshyam Dass v. Dominion of India*, (1984) 3 SCC 46 at p. 56. AIR 1984 SC 1004 at p. 1010.

28. (1976) 1 SCC 719; AIR 1976 SC 1177.

29. *Ibid*, at p. 722 (SCC) at p. 1179 (AIR), see also, the following opt-quoted observations of Bose, J. in *Sangram Singh v. Election Tribunal*, AIR 1955 SC 425 at p. 429: (1955) 2 SCR 1 at p. 8: "[A] Code of procedure must be regarded as such. It is 'procedure', something designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties, not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to 'both' sides) lest the very means designed for the furtherance of justice be used to frustrate it" See also *Chinnammal v. P. Arumugham*, (1990) 1 SCC 513 at p. 520; AIR 1990 SC 1828 at p. 1833, *Ramankutty Gupta v. Avara*, (1994) 2 SCC 642 at p. 646; AIR 1994 SC 1699 at p. 1701. For further discussion, see *infra*, "Pleadings".

Rules. The sections deal with provisions of a substantive nature, laying down the general principles of jurisdiction, while the (First) Schedule relates to the procedure and the method, manner and mode in which the jurisdiction may be exercised. The body of the Code containing sections is fundamental and cannot be amended except by the legislature. The (First) Schedule of the Code, containing Orders and Rules, on the other hand, can be amended by High Courts.<sup>30</sup>

Looking to the scheme of the Code as a whole, it becomes abundantly clear that the amendments made by High Courts in the Rules contained in the (First) Schedule also become part of the Code for all purposes "as if enacted in the Code".<sup>31</sup> The sections and the rules, therefore, must be read together and harmoniously construed,<sup>32</sup> but if the rules are inconsistent with the sections, the latter will prevail.<sup>33</sup>

## 10. RETROSPECTIVE OPERATION

It is a well-settled principle of interpretation of statutes that procedural laws are always retrospective in operation unless there are good reasons to the contrary.<sup>34</sup> Their provisions will apply to proceedings already commenced at the time of their enactment. The reason is that no one can have a vested right in forms of procedure.<sup>35</sup> The Code of Civil Procedure is not retrospective in operation.<sup>36</sup>

## 11. CODE AT A GLANCE

The substantive part of the Code of Civil Procedure contains 158 sections. The (First) Schedule comprises 51 Orders and Rules providing

30. Ss. 121, 122, 125-131; see also *Vareed Jacob v. Sosamma Greevarghese*, (2004) 6 SCC 378; AIR 2004 SC 3992.
31. Ss. 2(1), 2(18), 121, 122, 127; see also *State of U P v. Chandra Bhushan*, (1980) 1 SCC 198.
32. *Nadella Satyanarayana v. Yamanoori Venkata Subbiah*, AIR 1957 AP 172 at p. 181 (FB), *State of U P v. Babu Ram*, AIR 1961 SC 751 at p. 761, (1961) 2 SCR 679, *STO v. H. Farid Ahmed & Sons*, (1976) 1 SCC 245; AIR 1975 SC 756.
33. *Director of Inspection of Income Tax (Investigation) v. Pooran Mal & Sons*, (1975) 4 SCC 568; AIR 1975 SC 67, *State of U P v. Babu Ram Upadhyaya*, AIR 1961 SC 751 at p. 761 (1961) 2 SCR 679.
34. *Nani Gopal Mitra v. State of Bihar*, AIR 1970 SC 1636; (1969) 2 SCR 411, *K. Kapen Chako v. Provident Investment Co. (P) Ltd.*, (1977) 1 SCC 593; AIR 1976 SC 2610, *Mahadeo Prasad v. Ram Lochan*, (1980) 4 SCC 354 at p. 361; AIR 1981 SC 416 at p. 420, *Craies, Statute Law* (1971) at p. 401, *Maxwell, Interpretation of Statutes* (1972) at p. 222, *Halsbury's Laws of England* (4th Edn.) Vol. 44 at p. 574, *Gurbachan Singh v. Satpal Singh*, (1990) 1 SCC 445 at p. 460; AIR 1990 SC 209 at p. 219, *Rajasthan SRTC v. Poonam Pahuja*, (1997) 6 SCC 100 (115-16).
35. *Anant Gopal v. State of Bombay*, AIR 1958 SC 915 at p. 917; 1959 SCR 919, *Mahadeo Prasad Singh v. Ram Lochan*, (1980) 4 SCC 354 at p. 361; *Maxwell supra*, *Craies supra*.
36. *Garikapati Veeraya v. N. Subbiah Chaudhru*, AIR 1957 SC 540; 1957 SCR 488, *Mahadeo Prasad Singh v. Ram Lochan*, (1980) 4 SCC 354 at p. 361, *Mahamaji Jain v. Sawai Man Singh*, AIR 1962 SC 73; (1961) 1 SCR 702.

procedure. Appendices contain Model Forms of Pleadings, Processes, Decrees, Appeals, Execution proceedings, etc.

Sections 1 to 8 are preliminary in nature. Section 1 provides for commencement and applicability of the Code. Section 2 is a definition clause and a sort of statutory dictionary of important terms used in the body of the Code. Sections 3 to 8 deal with constitution of different types of courts and their jurisdiction.

Part I (Sections 9 to 35-B) and Orders 1 to 20 of the (First) Schedule deal with suits. Section 9 enacts that a civil court has jurisdiction to try all suits of a civil nature unless they are barred expressly or impliedly. Whereas Section 10 provides for stay of suit (*res sub judice*), Section 11 deals with a well-known doctrine of *res judicata*. Sections 13 and 14 relate to foreign judgments.

Sections 15 to 21-A regulate the place of suing. They lay down rules as to jurisdiction of courts and objections as to jurisdiction. Sections 22 to 25 make provisions for transfer and withdrawal of suits, appeals and other proceedings from one court to another.

Orders 1 to 4 deal with institution and frame of suits, parties to suit and recognised agents and pleaders. Order 5 contains provisions as to issue and service of summons. Order 6 deals with pleadings. Orders 7 and 8 relate to complaints, written statements, set-offs and counter-claims. Order 9 requires parties to the suit to appear before the court and enumerates consequences of non-appearance. It also provides the remedy for setting aside an order of dismissal of the suit of a plaintiff and of setting aside an *ex parte* decree against a defendant.

Order 10 enjoins the court to examine parties with a view to ascertaining matters in controversy in the suit. Orders 11 to 13 deal with discovery, inspection and production of documents and also admissions by parties. Order 14 requires the court to frame issues and Order 15 enables the court to pronounce judgment at the "first hearing" in certain cases.

Orders 16 to 18 contain provisions for summoning, attendance and examination of witnesses, and adjournments. Order 19 empowers the court to make an order or to prove facts on the basis of an affidavit of a party.

Sections 75 to 78 (Part III) and Order 26 make provisions as to issue of Commissions. Sections 94 and 95 (Part VI) and Order 38 provides for arrest of a defendant and attachment before judgment. Order 39 lays down the procedure for issuing temporary injunction and passing interlocutory orders. Order 40 deals with appointment of receivers. Order 25 provides for security for costs. Order 23 deals with withdrawal and compromise of suits. Order 22 declares effect of death, marriage or insolvency of a party to the suit.

After the hearing is over, the court pronounces a judgment. Section 33 and Order 20 deal with judgments and decrees. Section 34 makes provision for interest. Sections 35, 35-A, 35-B and Order 20-A deal with costs.

Parts IV and V (Sections 79-93) and Orders 27 to 37 lay down procedure for suits in special cases, such as, suits by or against Government or public officers (Section 79 to 82 and Order 27); suits by or against aliens, foreign rulers, ambassadors and envoys (Sections 83 to 87-B); suits by or against soldiers, sailors and airmen (Order 28); suits by or against corporations (Order 29); suits by or against partnership firms (Order 30); suits by or against trustees, executors and administrators (Order 31); suits by or against minors, lunatics and persons of unsound mind (Order 32); suits relating to family matters (Order 32-A); suits by indigent persons (paupers) (Order 33); suits relating to mortgages (Order 34); interpleader suits (Section 88 and Order 35); friendly suits (Section 90 and Order 36); summary suits (Order 37); suits relating to public nuisances (Section 91) and suits relating to public trusts (Section 92). Section 89 as inserted from 1 July 2002 provides for settlement of disputes out of court through arbitration, conciliation, mediation and *Lok Adalats*.

Parts VII and VIII (Sections 96 to 115) and Orders 41 to 47 contain detailed provisions for Appeals, Reference, Review and Revision. Sections 96 to 99-A and Order 41 deal with First Appeals. Sections 100 to 103 and Order 42 discuss law relating to Second Appeals. Sections 104 to 108 and Order 43 contain provisions as to Appeals from Orders. Sections 109, 112 and Order 45 provide for Appeals to the Supreme Court. Order 44 enacts special law concerning Appeals by indigent persons (paupers). Section 113 and Order 46 pertain to References to be made to a High Court by a subordinate court when a question of constitutional validity of an Act arises. Section 114 and Order 47 permit review of judgments in certain circumstances. Section 115 confers revisional jurisdiction on High Courts over subordinate courts.

Part II (Sections 36 to 74) and Order 21 cover execution proceedings. The principles governing execution of decrees and orders are dealt with in Sections 36 to 74 (substantive law) and Order 21 (procedural law). Order 21 is the longest Order covering 106 Rules.

Part X (Sections 121 to 131) enables High Courts to frame rules for regulating their own procedure and the procedure of civil courts subject to their superintendence.

Part XI (Sections 132 to 158) relates to miscellaneous proceedings. Explanation to Section 141 as added by the Amendment Act of 1976 clarifies that the expression "proceedings" would not include proceedings under Article 226 of the Constitution. Section 144 embodies the doctrine of restitution and deals with the power of the court to grant

relief of restitution in case a decree is set aside or modified by a superior court.

Section 148-A as inserted by the Code of Civil Procedure (Amendment) Act, 1976 is an important provision which permits a person to lodge a caveat in a suit or proceeding instituted or about to be instituted against him. It is the duty of the court to issue notice and afford an opportunity of hearing to a caveator to appear and oppose interim relief sought by an applicant.

Sections 148 to 153-A confer inherent powers in every civil court. Section 148 enables a court to enlarge time fixed or granted by it for doing any act. Section 149 authorises a court to permit a party to make up deficiency of court fees on plaint, memorandum of appeal, etc. Section 151 is a salutary provision. It saves inherent powers in every court to secure the ends of justice and also to prevent the abuse of process of the court. Sections 152 to 153-A empower a court to amend judgments, decrees, orders and other records arising from accidental slip or omission.

Section 153-B as added by the Amendment Act of 1976 expressly declares that the place of trial shall be open to the public. The proviso, however, empowers the Presiding Judge, if he thinks fit, to order that the general public or any particular person shall not have access to the court.

## CHAPTER 2

# Definitions

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### 1. GENERAL

In most of the statutes a section provides for definition of some important expressions used in the body of the Act. A definition clause is a sort

of statutory dictionary<sup>1</sup>, a legislative device with a view to avoid making different provisions of the statute needlessly cumbersome.<sup>2</sup> Where a word is defined in a statute and that word is used in a provision to which that definition is applicable, the effect is that wherever the word defined is used in that provision, the definition of the word gets substituted.<sup>3</sup> This normal rule may be departed from if there be something in the context to show that the definition should not be applied or when the context strongly suggests its departure.<sup>4</sup>

## 2. IMPORTANT DEFINITIONS

In Section 2 of the Code of Civil Procedure, *inter alia*, the following important definitions are given:

### (1) Decree<sup>5</sup>

#### (a) Meaning

The adjudications of a court of law may be divided into two classes: (i) decrees, and (ii) orders.

Section 2(2) of the Code defines the term "decree" in the following words:

" 'Decree' means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

*Explanation.*—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

1. *Carew & Co. Ltd. v. Union of India*, (1975) 2 SCC 791 at p. 805; AIR 1975 SC 2260 at p. 2272.
2. *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1 at p. 96; AIR 1975 SC 2299 at p. 2357.
3. *Ibid.* ("Unless there is anything repugnant in the subject or context"; S. 2).
4. *Carew & Co. Ltd. v. Union of India*, (1975) 2 SCC 791, 804.
5. See also *infra*, Pt II, Chap. 15, *Vidyacharan Shukla v. Khubchand Baghel*, AIR 1964 SC 1099 at p. 1113; (1964) 6 SCR 129, *K V. Muthu v. Angamuthu*, (1997) 2 SCC 53 at pp 57-58; AIR 1997 SC 628 at p. 631, *K. Balakrishna v. Haji Abdulla*, (1980) 1 SCC 321; AIR 1980 SC 214; *Printers (Mysore) Ltd. v. CTO*, (1994) 2 SCC 43; *Chandi Prasad v. Jagdish Prasad*, (2004) 8 SCC 724, *Rachakonda Venkat v. R. Satya Bai*, (2003) 7 SCC 452, *Paramjeet Singh v. ICDS Ltd.*, (2006) 13 SCC 322; AIR 2007 SC 168.

### (b) Essential elements

In order that a decision of a court may be a "decree", the following elements must be present:<sup>6</sup>

- (i) There must be an adjudication;
- (ii) Such adjudication must have been done in a suit;
- (iii) It must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit;
- (iv) Such determination must be of a conclusive nature; and
- (v) There must be a formal expression of such adjudication.

(i) *Adjudication*.—For a decision of a court to be a decree, there must be an adjudication, i.e. a judicial determination of the matter in dispute. If there is no judicial determination of any matter in dispute, it is not a decree.<sup>7</sup> Thus, a decision on a matter of an administrative nature, or an order dismissing a suit for default of appearance of parties or dismissing an appeal for want of prosecution cannot be termed as a decree inasmuch as it does not *judicially* deal with the matter in dispute.<sup>8</sup> Further, such judicial determination must be by a court. Thus, an order passed by an officer who is not a court is not a decree.<sup>9</sup>

(ii) *Suit*.—The expression "suit" is not defined in the Code. But in *Hansraj Gupta v. Official Liquidators of The Dehra Dun-Mussoorie Electric Tramway Co. Ltd.*<sup>10</sup>, Their Lordships of the Privy Council have defined the term in the following words, "The word 'suit' ordinarily means and apart from some context must be taken to mean, a civil proceeding instituted by the *presentation of a plaint*." (emphasis supplied) Thus, every suit is instituted by the presentation of a plaint. It means that when there is no civil suit, there is no decree. Thus, rejection of an application for leave to sue *in forma pauperis* is not a decree, as there is no plaint till the application is granted.

It may, however, be noted that under certain enactments specific provisions have been made to treat applications as suits, e.g. proceedings under the Indian Succession Act, the Hindu Marriage Act, the Land Acquisition Act, the Arbitration Act, etc. They are statutory suits and the decisions given thereunder are, therefore, decrees. Therefore, a proceeding which does not commence with a plaint and which is not

6 *S. Satnam Singh v. Surender Kaur* (2009) 2 SCC 562

7 *Madan Nair v. Hansubala Devi*, (1983) 3 SCC 15 AIR 1983 SC 676

8 *Motilal v. Padmaben* AIR 1982 Guj 254 (1982) 2 Guj LR 107 1982 Guj LH 349

9 *Deep Chand v. Land Acquisition Officer*, (1994) 4 SCC 99 at p. 102 AIR 1994 SC 1901 at p. 1903, *Dewan Bros. v. Central Bank of India*, (1976) 3 SCC 800 AIR 1976 SC 1503

10 (1932-33) 60 IA 13 AIR 1933 PC 63, see also *Pandurang Ramchandra v. Shantibai Ramchandra*, 1989 Supp (2) SCC 627 at p. 639 AIR 1989 SC 2240 at p. 2248 *Usmanali Khan v. Saqar Mal*, AIR 1965 SC 1798 at p. 1800 (1965) 3 SCR 201 See also *to the Govt. of Orissa v. Sarbeswar Rout*, (1989) 4 SCC 578 at p. 581 AIR 1989 SC 2259 at p. 2261

treated as a suit under any other Act, cannot be said to be a "suit" under the Code also and the decision given therein cannot be said to be a "decree" under Section 2(2) of the Code. Thus, a decision of a tribunal, even though described as "decree" under the Act, is a decree passed by a tribunal and not by a court covered by Section 2(2).<sup>11</sup>

(iii) *Rights of parties in controversy.*—The adjudication must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit. The word "rights" means substantive rights of the parties and not merely procedural rights.<sup>12</sup> Thus, rights of the parties *inter se* relating to status, limitation, jurisdiction, frame of suit, accounts, etc. are "rights of the parties" under this section. The rights in matters of procedure are not included in it. Thus, an order for dismissal of a suit for default of appearance, or an order dismissing an application for execution for non-prosecution, or an order refusing leave to sue *in forma pauperis*, or a mere right to sue, are not decrees as they do not determine the rights of parties.

The term "parties" means parties to the suit, i.e. the plaintiff and the defendant.<sup>13</sup> Thus, an order on an application by a third party, who is a stranger to the suit, is not a decree. In interpleader suits, the contesting defendants will be deemed to be parties to the suit.

The expression "matters in controversy" refers to the subject-matter of the suit with reference to which some relief is sought.<sup>14</sup> At the same time, however, it should not be understood as relating solely to the merits of the case. It would cover any question relating to the character and status of a party suing, to the jurisdiction of the court, to the maintainability of a suit and to other preliminary matters which necessitate an adjudication before a suit is enquired into. Interlocutory orders on matters of procedure which do not decide the substantive rights of the parties are not decrees. Similarly, the proceedings preliminary to the institution of a suit also will not be included in the definition.

(iv) *Conclusive determination.*—Such determination must be of a conclusive nature. In other words, the determination must be final and conclusive as regards the court which passes it.<sup>15</sup> Thus, an interlocutory order, which does not decide the rights of the parties finally is not a decree, e.g. an order refusing an adjournment or an order striking out defence of a tenant under the relevant Rent Act, or an order passed by the appellate court deciding some issues and remitting other issues to

11. *Diwan Bros. v. Central Bank of India*, (1976) 3 SCC 800 at pp. 807-08. AIR 1976 SC 1503 at p. 1518.

12. *Dattatraya v. Radhabai*, AIR 1921 Bom 220; ILR (1921) 45 Bom 627.

13. *Kanji Hirjibhai v. Jivraj Dharmshi*, AIR 1976 Guj 152; (1975) 16 Guj LR 469; *Venkata Reddy v. Pethi Reddy*, AIR 1963 SC 992. 1963 Supp (2) SCR 616.

14. *Ahmed Musaji Saleji v. Hashim Ibrahim Saleji*, (1914-15) 42 IA 91; AIR 1915 PC 116.

15. *Narayan Chandra v. Pratirodh Sahini*, AIR 1991 Cal 53

the trial court for determination under Order 41 Rule 23 of the Code, are not decrees because they do not decide rights of parties conclusively.

On the other hand, an order may determine conclusively the rights of the parties although it may not dispose of the suit. Thus, an order dismissing an appeal summarily under Order 41 of the Code or holding it to be not maintainable or a decision dismissing a suit for want of evidence or proof are decrees inasmuch as they decide conclusively the rights of the parties to the suit.<sup>16</sup>

The crucial point which requires to be decided in such a case is whether the decision is final and conclusive in essence and substance. If it is, it is a decree, if not, it is not a decree.<sup>17</sup>

(v) *Formal expression*.—There must be a formal expression of such adjudication. All the requirements of form must be complied with. The formal expression must be deliberate and given in the manner provided by law. The decree follows the judgment and must be drawn up separately.<sup>18</sup> Thus, if a decree is not formally drawn up in terms of the judgment, no appeal lies from that judgment. But the decree need not be in a particular form. Thus, a misdescription of a decision as an order which amounts to a decree does not make it less than a decree.

### (c) Test

Whether or not an order of the court is a decree, the Court should take into account pleadings of the parties and the proceedings leading up to the passing of an order.<sup>19</sup> With a view to find out the meaning of the words in the order and to determine whether such order is a decree, the court often may have to consider the circumstances under which the order was made and the words were used.<sup>20</sup>

### (d) Decisions which are decrees: Illustrations

The following decisions are held to be decrees:

16. For detailed discussion, see *infra*, "First Appeal".
17. *Jethanand & Sons v. State of U.P.*, AIR 1961 SC 794. (1961) 3 SCR 754; *Sukhdeo v Govinda Hari*, AIR 1980 Bom 231, *Narayan Chandra v Pratirodh Sahni*, AIR 1991 Cal 53.
18. Or. 20 Rr. 6, 6-A, 7, see also *Shakuntala Devi Jain v Kuntal Kumari*, AIR 1969 SC 575 (577) (1969) 1 SCR 1006.
19. *Venkata Reddy v Pethi Reddy*, AIR 1963 SC 992 1963 Supp (2) SCR 616 *Hamced Jonaran v Abdul Salam*, (2001) 7 SCC 573, *Ratansingh v Vijnaysingh*, (2001) 1 SCC 469 AIR 2001 SC 279, *Shri Shakti Coop Housing Society v Swaraj Developers*, (2003) 6 SCC 659 AIR 2003 SC 2434.
20. *Venkata Reddy v Pethi Reddy*, AIR 1963 SC 992 1963 Supp (2) SCR 616, *Bhogaram Venkata Janaki Rama Rao v Board of Commrs for Hindu Religious Endowments* AIR 1965 SC 231 *Khushro S. Gandhi v N A Guzder*, (1969) 1 SCC 3581 AIR 1970 SC 1468 (1969) 2 SCR 959.

- (i) Order of abatement of suit;
- (ii) Dismissal of appeal as time barred;
- (iii) Dismissal of suit or appeal for want of evidence or proof;
- (iv) Rejection of plaint for non-payment of court fees;
- (v) Granting or refusing to grant costs or instalment;
- (vi) Modification of scheme under Section 92 of the Code;
- (vii) Order holding appeal not maintainable;
- (viii) Order holding that the right to sue does not survive;
- (ix) Order holding that there is no cause of action;
- (x) Order refusing one of several reliefs.

(e) Decisions which are not decrees: Illustrations

The following decisions, on the other hand, are held not to be decrees:

- (i) Dismissal of appeal for default;
- (ii) Appointment of Commissioner to take accounts;
- (iii) Order of remand;
- (iv) Order granting or refusing interim relief;
- (v) Return of plaint for presentation to proper court;
- (vi) Dismissal of suit under Order 23 Rule 1;
- (vii) Rejection of application for condonation of delay;
- (viii) Order holding an application to be maintainable;
- (ix) Order refusing to set aside sale;
- (x) Order directing assessment of mesne profits.

(f) Classes of decrees

The Code recognises the following classes of decrees:

- (i) Preliminary decree;
- (ii) Final decree; and
- (iii) Partly preliminary and partly final decree.

In *Shankar v. Chandrakant*,<sup>21</sup> the Supreme Court stated:

"A preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then, as a result of the further inquiries, conducted pursuant to the preliminary decree, the rights of the parties are fully determined and a decree is passed in accordance with such determination which is final. Both the decrees are in the same suit. A final decree may be said to become final in two ways:

- (i) When the time for appeal has expired without any appeal being filed against the preliminary decree or the matter has been decided by the Highest Court;

21. (1995) 3 SCC 413 (416). AIR 1995 SC 1211 (1212).

- (ii) When, as regards the court passing the decree, the same stands completely disposed of.

It is in the latter sense that the word 'decree' is used in Section 2(2) of the CPC."<sup>22</sup>

(i) *Preliminary decree*.—Where an adjudication decides the rights of the parties with regard to all or any of the matters in controversy in the suit, but does not completely dispose of the suit, it is a preliminary decree. A preliminary decree is passed in those cases in which the court has first to adjudicate upon the rights of the parties and has then to stay its hands for the time being, until it is in a position to pass a final decree in the suit. In other words, a preliminary decree is only a stage in working out the rights of the parties which are to be finally adjudicated by a final decree.<sup>23</sup> Till then the suit continues.<sup>24</sup>

The Code provides for passing of preliminary decrees in the following suits:

(1) Suits for possession and mesne profits	Order 20, R. 12
(2) Administration suits	Order 20, R. 13
(3) Suits for pre-emption	Order 20, R. 14
(4) " " dissolution of partnership	Order 20, R. 15
(5) " " accounts between principal and agent	Order 20, R. 16
(6) " " partition and separate possession	Order 20, R. 18
(7) " " foreclosure of a mortgage	Order 34, Rr. 2-3
(8) " " sale of mortgaged property	Order 34, Rr. 4-5
(9) " " redemption of a mortgage	Order 34, Rr. 7-8

The above list is, however, not exhaustive and a court may pass a preliminary decree in cases not expressly provided for in the Code.<sup>25</sup>

There is a conflict of opinion as to whether there can be more than one preliminary decree in the same suit. Some High Courts have taken the view that there can be only one preliminary decree in a suit,<sup>26</sup> while other High Courts have held that there can be more than one preliminary decree.<sup>27</sup>

22. *Ibid.* at p. 416 (SCC) at p. 1212 (AIR); see also *Hasham Abbas v. Usman Abbas*, (2007) 2 SCC 355 AIR 2007 SC 1077, *Bicoba v. Hirabai*, (2008) 8 SCC 198.

23. *Mool Chand v. Director, Consolidation*, (1995) 5 SCC 631 AIR 1995 SC 2493, *Shankar v. Chandrakant*, (1995) 3 SCC 413 AIR 1995 SC 1211; *Hasham Abbas v. Usman Abbas*, (2007) 2 SCC 355 AIR 2007 SC 1077.

24. *Awadhendra Prasad v. Raghubansmani Prasad*, AIR 1979 Pat 50 1978 BLJR 815.

25. *Narayanan Thampi v. Lekshmi Narayana Iyer*, AIR 1953 TC 220 at p. 222 (FB), *Pearu Mohan Mookerjee v. Manohar Mookerjee*, AIR 1924 Cal 160 at p. 162 27 CWN 989, *Union of India v. Khetra Mohan*, AIR 1960 Cal 190 at p. 198, *Bhagwan Singh v. Kaila Maula Shah*, AIR 1977 MP 257 1977 MP LJ 583 1977 lab LJ 576 (FB).

26. *Bharat Indu v. Yakub Hasan*, ILR (1913) 35 All 159, *Kedarnath v. Pattu Lal*, AIR 1915 Oudh 312, *Joti Parshad v. Ganesh Lal*, AIR 1961 Punj 120.

27. *Pearu Mohan Mookerjee v. Manohar Mookerjee*, AIR 1924 Cal 160, *Kasi v. Ramanathan Chettiar*, (1947) 2 MLJ 523, *Parashuram Rajaram v. Hirabai Rajaram*, AIR 1957 Bom 59.

As regards partition suits, the debate is concluded by the pronouncement of the Supreme Court in *Phoolchand v. Gopal Lal*<sup>28</sup>, wherein it has been observed that there is nothing in the Code of Civil Procedure which prohibits passing of more than one preliminary decree, if circumstances justify the same and it may be necessary to do so. But the above observations are restricted to partition suits as the Court specifically observed, "We should however like to point out that what we are saying must be confined to partition suits, for we are not concerned in the present appeal with other kinds of suits in which preliminary and final decrees are also passed."<sup>29</sup>

The question whether a decision amounts to a preliminary decree or not is one of great significance in view of the provisions of Section 97 of the Code which provides that, "Where any party aggrieved by a preliminary decree ... does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree."<sup>30</sup>

Since the passing of a preliminary decree is only a stage prior to the passing of a final decree, if an appeal preferred against a preliminary decree succeeds, the final decree automatically falls to the ground for there is no preliminary decree thereafter in support of it.<sup>31</sup> It is not necessary in such a case for the defendant to go to the Court passing the final decree and ask it to set aside the final decree.<sup>32</sup>

(ii) *Final decree*.—A decree may be said to be final in two ways:

- (i) when within the prescribed period no appeal is filed against the decree or the matter has been decided by the decree of the highest court; and
- (ii) when the decree, so far as regards the court passing it, completely disposes of the suit.<sup>33</sup>

It is in the latter sense that the words "final decree" are used here.

A final decree is one which completely disposes of a suit and finally settles all questions in controversy between parties and nothing further remains to be decided thereafter.

Thus, in a suit for recovery of money, if the amount found due to the decree-holder is declared and the manner in which the amount is to

28. AIR 1967 SC 1470: (1967) 3 SCR 153.

29. *Ibid*, at p. 1473 (AIR). at p. 159 (SCR), see also *Jadu Nath Roy v. Parameswar Mullick*, (1939-40) 67 IA 11: AIR 1940 PC 11.

30. *Venkata Reddy v. Pethi Reddy*, AIR 1963 SC 992: 1963 Supp (2) SCR 616; *Mool Chand v. Director, Consolidation*, (1995) 5 SCC 631: AIR 1995 SC 2493.

31. *Sital Parshad Saxena v. Kishori Lal*, AIR 1967 SC 1236 at p. 1240: (1967) 3 SCR 101.

32. *Venkata Reddy v. Pethi Reddy*, AIR 1963 SC 992: 1963 Supp (2) SCR 616, *Mool Chand v. Director, Consolidation*, (1995) 5 SCC 631: AIR 1995 SC 2493.

33. *Shankar v. Chandrakant*, (1995) 3 SCC 413 at p. 418: AIR 1995 SC 1211; *Hasham Abbas v. Usman Abbas*, (2007) 2 SCC 355: AIR 2007 SC 1077.

be paid has also been laid down, the decree is a final decree. Similarly, a decree passed for a sum representing past mesne profits and future mesne profits at a particular rate, without directing any further enquiry, is a final decree. Thus, where a decree passed by a special court did not contemplate any further proceedings, the decree, even though described as a preliminary decree, in substance was a final decree.

Ordinarily, there will be one preliminary decree and one final decree in one suit.<sup>34</sup>

In *Gulusam Bivi v. Ahamadasa Rowther*<sup>35</sup>, the High Court of Madras, referring to Rules 12 and 18 of Order 20 of the Code, stated:

"Neither rule contemplates more than one preliminary decree and one final decree in one suit. In fact, the Code nowhere contemplates more than one final decree in one suit. To have two final decrees and to call the first one a final decree will be really a misnomer as it will not be final."

(emphasis supplied)

In *Kasi v. Ramanathan Chettiar*<sup>36</sup>, the same court considered the question at considerable length. It was noted that there was divergence of opinion whether there could be more than one preliminary decree as also more than one final decree in a suit. Then considering the question in detail and describing the observations in *Ghulsam Bivi* as *obiter dicta*, the Court observed that there could be more than one preliminary decree and more than one final decree in a suit.

Patanjali Sastri, J. (as he then was) rightly concluded the matter thus.

"(T)he question is not whether the Code allows more than one preliminary decree or one final decree to be made, but whether the Code contains a prohibition against the Court in a proper case passing more than one such decree."<sup>37</sup>

Finally, in *Shankar v. Chandrakant*<sup>38</sup> the Supreme Court said:

"It is settled law that more than one final decree can be passed".

(iii) *Partly preliminary and partly final decree.*—A decree may be partly preliminary and partly final, e.g. in a suit for possession of immovable property with mesne profits, where the court:

34. *Babburu Basavayya v. Babburu Guravayya*, AIR 1951 Mad 938 (FB), *Sudarshan Dass v. Ramkripal Dass*, AIR 1967 Pat 131, *Nallasivam Chettiar v. Avudayammal*, AIR 1958 Mad 462, *Kanji Hirjibhai v. Jivraj Dharamshi*, AIR 1976 Guj 152 (1975) 16 Guj LR 469, *Anandi Devi v. Mahendra Singh*, AIR 1997 Pat 7.

35. AIR 1919 Mad 998. ILR (1918) 42 Mad 296 51 IC 140.

36. (1947) 2 MLJ 523.

37. *Ibid.*, at p. 527 (MLJ), see also *Maulvi Mohd. Abdul Majid v. Mohd. Abdul Aziz*, (1896-97) 24 IA 22 (PC), *Babburu Basavayya v. Babburu Guravayya*, AIR 1951 Mad 938, *Kanji Hirjibhai v. Jivraj Dharamshi*, AIR 1976 Guj 152, *Veerappa v. Sengoda*, (1995) 1 MLJ 53, *P. Azeez Ahmed v. SBI* (1995) 1 MLJ 446.

38. (1995) 3 SCC 413 at p. 418. AIR 1995 SC 1211 at p. 1214, see also *Hasham Abbas v. Usman Abbas* (2007) 2 SCC 355. AIR 2007 SC 1077. For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers Edn.) Vol. IV, Or. 20 R. 18.

- (a) decrees possession of the property; and
- (b) directs an enquiry into the mesne profits.

The former part of the decree is final, while the latter part is only preliminary because the final decree for mesne profits can be drawn only after enquiry, and the amount due is ascertained. In such a case, even though the decree is only one, it is partly preliminary and partly final.<sup>39</sup>

### (g) Deemed decree

(i) *Meaning.*—The term “deemed” is generally used to create a statutory fiction for the purpose of extending the meaning which it does not expressly cover.<sup>40</sup>

In *CIT v. Bombay Trust Corpn.*<sup>41</sup>, the Privy Council stated, “(W)hen a person is ‘deemed to be’ something, the only meaning possible is that whereas he is not in reality that something, the Act of Parliament or the Legislature requires him to be treated as if he were.”

(ii) *Nature and scope.*—Whenever the legislature uses the word “deemed” in any statute in relation to a person or thing, it implies that the Legislature, after due consideration, conferred a particular status on a particular person or thing.<sup>42</sup>

Such statutory fiction created by the legislature cannot be ignored. The effect of such legal fiction must be given. In *East End Dwellings Co. Ltd. v. Finsbury Borough Council*<sup>43</sup>, Asquith, J. rightly said, “The statute says that you must imagine a certain state of affairs. It does not say that, having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.”

(iii) *Decree and deemed decree: Distinction.*—An adjudication not fulfilling the requisites of Section 2(2) of the Code cannot be said to be a “decree”. By a legal fiction, certain orders and determinations are deemed to be “decrees” under the Code.

39. *Lucy Kochuvareed v. P. Mariappa Gounder*, (1979) 3 SCC 150 at p. 159: AIR 1979 SC 1214 at p. 1220

40. *St. Aubyn v. Attorney-General*, 1952 AC 15; (1951) 2 All ER 473; *Lalji Haridas v. State of Maharashtra*, (1969) 2 SCC 662: AIR 1971 SC 44, *CIT v. Bombay Trust Corpn. Ltd.*, (1929-30) 57 IA 49. AIR 1930 PC 54; *East End Dwellings Co. Ltd. v. Finsbury Borough Council*, 1952 AC 109; (1951) 2 All ER 587 (HL).

41. (1929-30) 57 IA 49. AIR 1930 PC 54 (per Viscount Dunedin).

42. *Lucy Kochuvareed v. P. Mariappa Gounder*, (1979) 3 SCC 150, see also *K. Kamaraja Nadar v. Kunju Thevar*, AIR 1958 SC 687; 1959 SCR 583, *M. Venugopal v. LIC*, (1994) 2 SCC 323; AIR 1994 SC 1343; (1994) 27 ATC 84; *State of Maharashtra v. Laljit Rajshu*, (2000) 2 SCC 699; AIR 2000 SC 937.

43. 1952 AC 109. (1951) 2 All ER 587 (HL); see also *Cambay Electric Supply Industrial Co. v. CIT*, (1978) 2 SCC 644: AIR 1978 SC 1099.

(iv) *Deemed decrees under CPC.*—The rejection of a plaint and the determination of questions under Section 144 (Restitution) are deemed decrees. Similarly, adjudications under Order 21 Rule 58, as also under Order 21 Rule 98 or 100 are deemed decrees.

### (b) Rejection of plaint

Even though an order rejecting a plaint does not preclude the plaintiff from presenting a fresh plaint on the same cause of action,<sup>44</sup> Section 2(2) of the Code specifically provides that rejection of a plaint shall be deemed to be a decree. The rejection of a plaint must be one authorised by the Code. If it is not under the Code, the rejection will not amount to a decree.

An order returning a plaint or memorandum of appeal to be presented to the proper court is also not a decree. The reason is that such an order does not negate any rights of a plaintiff or appellant and is not a decision on the rights of parties. An order returning a plaint to be presented to the proper court is an appealable order.<sup>45</sup> The question whether an order is one of *rejection* or of *dismissal* of a suit or appeal must be determined with reference to the substance and not the form of the order.

### (i) Restitution

The determination of any question within Section 144 of the Code is expressly included in the definition of "decree" though such determination is neither made in a suit, nor is it drawn up in the form of a decree. Section 144 deals with restitution and determination of a question under that section, and is included in the definition of "decree" for the purpose of giving a right of appeal.<sup>46</sup>

Every order under Section 144, however, is not a decree. It is necessary that such order must have decided the rights of parties with regard to matters in controversy in proceedings under that section. In other words, it must be a final decision either granting a relief or refusing an application. Thus, determination of a mere issue made prior to the passing of a final order or an order merely determining a point of law arising incidentally in the course of proceedings for determining rights of parties is not a decree.

44. Or 7 R 13; see also *Shamsher Singh v. Rajinder Prashad*, (1973) 2 SCC 524 at pp 527-28; AIR 1973 SC 2384 at p 2386.

45. Or 43 R 1(a).

46. *Mahiponhai Monanbhai v. Patel Manibhai*, AIR 1965 SC 1477 at p 1485 (1965) 2 SCR 436.

(j) **Execution**

Prior to the Code of Civil Procedure (Amendment) Act, 1976, the determination of any question under Section 47 was also expressly included in the definition of "decree".<sup>47</sup> The Joint Committee of both Houses of Parliament was of the view that this provision was mainly responsible for delay in execution of decrees. The Committee, therefore, recommended to omit the words "Section 47 or" from the definition of "decree" and as such now a decision under Section 47 is not a decree and consequently is not appealable as a decree.<sup>48</sup> Under the New Code, now it will not be very difficult for the decree-holder to get the fruits of a decree passed in his favour. It is, however, doubtful whether the amendment has achieved its object.

(k) **Dismissal for default**

The definition of "decree" does not include any order of "dismissal for default". The words "dismissal for default" include, for want of prosecution of suit or appeal, default for non-appearance or for other reasons.<sup>49</sup>

(l) **Appealable orders**

The term "decree" expressly excludes an adjudication from which an appeal lies as an appeal from an order. Such orders are specified in Section 104 and Order 43 Rule 1 of the Code.<sup>50</sup> Thus, an order returning a plaint for presentation to the proper court, or an order rejecting an application for an order to set aside an *ex parte* decree, or setting aside or refusing to set aside a sale under Order 21, or an order rejecting an application for permission to sue as an indigent person, etc. are appealable orders and not decrees.

The distinction between a decree and an appealable order lies in the fact that in the case of a decree, a Second Appeal lies in some cases,<sup>51</sup> but no Second Appeal lies from an appealable order.<sup>52</sup>

47. The Code of Civil Procedure, before the Amendment Act of 1976, defined "decree" in the following words:

"'Decree' means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within S. 47 or S. 144, but shall not include ... etc."

48. For detailed discussion, see *infra*, Pt. IV, Chap. 7.

49. *Chunduru Venkata Subrahmanyam, Re*, AIR 1955 AP 74 (FB).

50. *Madan Naik v. Hansubala Devi*, (1983) 3 SCC 15 at p. 19. AIR 1983 SC 676 at p. 679.

51. S. 100; see also *infra*, Pt. III, Chap. 3.

52. S. 104(2), see also *infra*, Pt. III, Chap. 4.

- (m) Decree and judgment: Distinction<sup>53</sup>
- (n) Decree and order: Distinction<sup>54</sup>
- (o) Decree and deemed decree: Distinction<sup>55</sup>

## (2) Judge

"Judge" means the presiding officer of a civil court.<sup>56</sup> The term "court" has not been defined in the Code. According to the dictionary meaning, court means "an assembly of judges or other persons acting as a tribunal in civil and criminal cases".<sup>57</sup> In other words, it is "a place where justice is judicially administered".<sup>58</sup>

When a statute provides that a particular matter will be determined by a court, the officer presiding over the said court will be deemed to exercise jurisdiction as a court and not as a *persona designata*. But by the mere fact that, under the relevant statute, some functions are to be performed by a judicial officer, it cannot be said that he is acting as a court.

## (3) Judgment<sup>59</sup>

### (a) Meaning

"Judgment" means the statement given by a judge of the grounds of a decree or order.<sup>60</sup>

### (b) Essentials

The essential element of a judgment is that there should be a statement for the grounds of the decision.<sup>61</sup> Every judgment other than that of a Court of Small Causes should contain (i) a concise statement of the case; (ii) the points for determination; (iii) the decision thereon; and (iv) the reasons for such decision. A judgment of a Court of Small Causes may contain only points (ii) and (iii). Sketchy orders which are not self-contained and cannot be appreciated by an appellate or revisional

53. See *infra*, "Judgment and decree".

54. See *infra*, "Order and decree".

55. See *supra*, under that head.

56. S 2(8)

57. Concise Oxford Dictionary (1990) at p 266, Stroud's Judicial Dictionary (1971) Vol 1 at p. 612.

58. *F D Sinclair v. I P D Broughton*, ILR (1893) 9 Cal 341

59. See also *infra*, Pt II, Chap 15

60. S 2(9)

61. *Vidya Charan Shukla v. Khubchand Baghel*, AIR 1964 SC 1099 at p 1113 (1964) 6 SCR 129, *Swaran Lata v. H K Banerjee* (1969) 1 SCC 709 AIR 1969 SC 1167 *State of T N v S Thangavel*, (1997) 2 SCC 349 AIR 1997 SC 2283, *Balraj Taneja v. Sunil Madan* (1999) 8 SCC 396 AIR 1999 SC 3381.

court without examining all the records are, therefore, unsatisfactory and cannot be said to be judgments in that sense.

As the Supreme Court in *Balraj Taneja v. Sunil Madan*<sup>62</sup>, a judge cannot merely say "Suit decreed" or "Suit dismissed". The whole process of reasoning has to be set out for deciding the case one way or the other. Even the Small Causes Court's judgments must be intelligible and must show that the judge has applied his mind. The judgment need not, however, be a decision on all the issues in a case. Thus, an order deciding a preliminary issue in a case, e.g. constitutional validity of a statute, is a judgment.

Conversely, an order passed by the Central Administrative Tribunal cannot be said to be a judgment, even if it has been described as such.<sup>63</sup> Similarly, the meaning of the term "judgment" under the Letters Patent is wider than the definition of "judgment" under the CPC.<sup>64</sup>

### (c) Judgment and decree: Distinction

As stated above, "judgment" means the statement given by a judge on the grounds of a decree or order. It is not necessary for a judge to give a statement in a decree though it is necessary in a judgment. Likewise, it is not necessary that there should be a formal expression of the order in the judgment, though it is desirable to do so. Rule 6-A of Order 20 as inserted by the Amendment Act of 1976, however, enacts that the last paragraph of the judgment should state precisely the relief granted. Thus, a judgment contemplates a stage prior to the passing of a decree or an order, and, after the pronouncement of the judgment, a decree shall follow.<sup>65</sup>

## (4) Order

### (a) Meaning

"Order" means the formal expression of any decision of a civil court which is not a decree.<sup>66</sup> Thus, the adjudication of a court which is not a decree is an order. As a general rule, an order of a court of law is founded on objective considerations and as such the judicial order must contain a discussion of the question at issue and the reasons which prevailed with the court which led to the passing of the order.

62. (1999) 8 SCC 396 at p. 415; AIR 1999 SC 3381 at p. 3391

63. *State of T.N. v. S. Thangavel*, (1997) 2 SCC 349 AIR 1997 SC 2283.

64. *Shah Babulal v. Jayaben D. Kania*, (1981) 4 SCC 8. AIR 1981 SC 1786.

65. S. 33.

66. S. 2(14). See also *Vidyacharan Shukla v. Khubchand Baghel*, AIR 1964 SC 1099 at p. 1113; (1964) 6 SCR 129.

### (b) Order and decree: Similarities

As discussed above, the adjudication of a court of law may either be (a) a decree; or (b) an order; and cannot be both. There are some common elements in both of them, viz. (1) both relate to matters in controversy; (2) both are decisions given by a court; (3) both are adjudications of a court of law; and (4) both are "formal expressions" of a decision.

### (c) Order and decree: Distinction

In spite of the above common elements, there are fundamental distinctions between the two expressions:

- (i) A decree can only be passed in a suit which commenced by presentation of a plaint. An order may originate from a suit by presentation of a plaint or may arise from a proceeding commenced by a petition or an application.
- (ii) A decree is an adjudication conclusively determining the rights of the parties with regard to all or any of the matters in controversy; an order, on the other hand, may or may not finally determine such rights.
- (iii) A decree may be preliminary or final, or partly preliminary and partly final, but there cannot be a preliminary order.
- (iv) Except in certain suits, where two decrees, one preliminary and the other final are passed, in every suit there can be only one decree; but in the case of a suit or proceeding, a number of orders may be passed.
- (v) Every decree is appealable, unless otherwise expressly provided,<sup>67</sup> but every order is not appealable. Only those orders are appealable as specified in the Code.<sup>68</sup>
- (vi) A Second Appeal lies to the High Court on certain grounds from the decree passed in First Appeal.<sup>69</sup> Thus, there may be two appeals; while no Second Appeal lies in case of appealable orders.<sup>70</sup>

### (5) Decree-holder

"Decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made.<sup>71</sup> From this definition, it is clear that the decree-holder need not necessarily be the

67 S 96 For detailed discussion, see *infra*, Pt III, Chap 2

68 S 104, Or 43 R 1 For detailed discussion, see *infra*, Pt III, Chap 4

69 S 100 For detailed discussion, see *infra*, Pt III, Chap 3

70 S 104(2)

71 S 2(3)

plaintiff. A person who is not a party to a suit but in whose favour an order capable of execution has been passed is also a decree-holder.<sup>72</sup>

Thus, where a decree for specific performance is passed, such a decree is capable of execution, both by the plaintiff as well as the defendant, and, therefore, either of the parties is a decree-holder. Similarly, if a decree confers upon someone a right to execute the decree, he is a decree-holder. Conversely, if, in an eviction order, time to vacate the premises is granted to the tenant, the landlord cannot be said to be a decree-holder in the strict sense till the period is over and the decree becomes executable.

### (6) Judgment-debtor

"Judgment-debtor" means any person against whom a decree has been passed, or an order capable of execution has been made.<sup>73</sup> Where a decree is passed against a surety, he is a judgment-debtor within the meaning of this section. On the other hand, a person who is a party to a suit, but no decree has been passed against him, is not a judgment-debtor.

### (7) Foreign court

"Foreign Court" means a court situate outside India and not established or continued by the authority of the Central Government.<sup>74</sup> Two conditions must be satisfied in order to bring a court within the definition of a foreign court:

- (1) It must be situate outside India; and
- (2) It must not have been established or continued by the Central Government.

Thus, courts in England, Scotland, Ceylon, Burma, Pakistan and those of the Privy Council are foreign courts.

### (8) Foreign judgment<sup>75</sup>

"Foreign judgment" means a judgment of a foreign court.<sup>76</sup> The crucial date to determine whether the judgment is of a foreign court or not is the date of the judgment and not the date when it is sought to be enforced or executed.<sup>77</sup>

72. *Dhani Ram v. Lala Sri Ram*, (1980) 2 SCC 162 at pp. 165-66: AIR 1980 SC 157 at pp. 159-61.

73. S. 2(10).

74. S. 2(5), see also *Lalji Raja and Sons v. Hansraj Nathuram*, (1971) 1 SCC 721: AIR 1971 SC 974; (1971) 3 SCR 815.

75. See also *infra*, Pt. II, Chap. 3.

76. S. 2(6).

77. *Raj Rajendra Sardar Moloji Nar Singh v. Shankar Saran*, AIR 1962 SC 1737 at p. 1744: (1963) 2 SCR 577 at pp. 593-94.

Thus, a judgment of a court which was a foreign court at the time of its pronouncement would not cease to be a foreign judgment by reason of the fact that subsequently the foreign territory has become a part of the Union of India.<sup>78</sup> On the other hand, an order which was good and competent when it was made and which was passed by a tribunal which was domestic at the date of its making and which could at that date have been enforced by an Indian court, does not lose its efficacy by reason of the partition.<sup>79</sup>

## (9) Legal representative

"Legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.<sup>80</sup>

The expression "legal representative" is inclusive in character, its scope is very wide and, thus, over and above a person who in law represents the estate of a deceased, it includes a person who intermeddles with the estate of a deceased and also a person on whom the estate devolves on the death of the party suing or sued, where a party sues or is sued in a representative character.<sup>81</sup>

The following persons are held to be legal representatives—executors, administrators, reversioners, Hindu coparceners, residuary legatees, etc. But a trespasser is not a legal representative as he does not intermeddle with the intention of representing the estate of the deceased. Similarly, an executor de-son Tort, a succeeding trustee, official assignee or receiver is not a legal representative.

## (10) Mesne profits<sup>82</sup>

### (a) Meaning

"Mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession.<sup>83</sup>

78 See also *infra*, Pt II, Chap 3

79. *Kishori Lal v. Shanti Devi*, AIR 1953 SC 441 at p 442 1953 Cri LJ 1023 *Shitole case*, AIR 1962 SC 1737, *Lalji Raja and Sons v. Hansraj Nathuram*, (1971) 1 SCC 721 AIR 1971 SC 974 (1971) 3 SCR 815.

80 S 2(11)

81 *BANCO National Ultramarino v. Nalini Bai Nairque*, 1989 Supp (2) SCC 275 at pp 277-78 AIR 1989 SC 1589, *Chiranjitlal v. Jasjit Singh*, (1993) 2 SCC 507

82 See also *infra*, Pt II, Chap 15 83 S 2(12)

**(b) Object**

Every person has a right to possess his property. And when he is deprived of such right by another person, he is not only entitled to restoration of possession of his property, but also damages for wrongful possession from that person. The mesne profits are thus a compensation paid to the real owner.

The object of awarding a decree for mesne profits is to compensate the person who has been kept out of possession and deprived of enjoyment of his property even though he was entitled to possession thereof.<sup>84</sup>

**(c) Against whom mesne profits can be claimed**

Wrongful possession of the defendant is the essence of a claim for mesne profits and the very foundation of the defendant's liability therefor. As a rule, therefore, generally, a person in wrongful possession and enjoyment of immovable property is liable for mesne profits.<sup>85</sup> It is very clear that mesne profits can be claimed with regard to immovable property only.

Thus, a decree for mesne profits can be passed against a trespasser, or against a person against whom a decree for possession is passed, or against a mortgagor in possession of mortgaged property after a decree for foreclosure has been passed against him, or against a mortgagee in possession of property even after a decree for redemption is passed, or against a tenant holding over at will after a notice to quit has been served upon him.

Where the plaintiff is dispossessed by several persons, every one of them would be liable to pay mesne profits to the plaintiff even though he might not be in actual possession or the profits might not have been received by him. The Court in such cases may hold all the trespassers jointly and severally liable, leaving them to have their respective rights adjusted in a separate suit for contribution; or, may ascertain and apportion the liability of each of them.<sup>86</sup>

**(d) Assessment**

Mesne profits being in the nature of damages, no invariable rule governing their award and assessment in every case can be laid down and

84. *Lucy Kochuvareed v. P. Mariappa Gounder*, (1979) 3 SCC 150 at p. 159; AIR 1979 SC 1214 at p. 1219.

85. *Lucy Kochuvareed v. P. Mariappa Gounder*, (1979) 3 SCC 150; *Chittoori v. Kudappa*, AIR 1965 SC 1325; (1965) 2 SCR 661.

86. *Lucy Kochuvareed v. P. Mariappa Gounder*, (1979) 3 SCC 150 at p. 159; AIR 1979 SC 1214 at p. 1219.

"the Court may mould it according to the justice of the case".<sup>87</sup> In assessing the mesne profits, usually the court will take into account what the defendant has gained or reasonably might have gained by his wrongful possession of the property.<sup>88</sup>

#### (e) Test

The test to ascertain mesne profits is not what the plaintiff has lost by being out of possession but what the defendant gained or might reasonably and with ordinary prudence have gained by such wrongful possession.<sup>89</sup>

#### (f) Principles

The following principles would ordinarily guide a court in determining the amount of mesne profits:

- (i) no profit by a person in wrongful possession;
- (ii) restoration of status before dispossession of decree-holder; and
- (iii) use to which a decree-holder would have put the property if he himself was in possession.

#### (g) Illustration

Thus, in a suit for title and possession where the land is in the occupation of a tenant, mesne profits should be awarded on the basis of rent and not on the basis of the produce or value of the property. At the same time, however, mesne profits cannot be calculated on the basis of standard rent or maximum rent that a landlord could have received if premises were let out afresh. Though the amount of standard rent is a relevant factor for calculating mesne profits, it is not decisive.<sup>90</sup>

But when a person in wrongful possession plants indigo on the land and it is proved that a prudent agriculturist would have planted sugarcane, wheat or tobacco, the mesne profits should be assessed on the basis of those more profitable crops.<sup>91</sup>

87. *Ibid.*, see also *Fateh Chand v Balkishan Dass*, AIR 1963 SC 1405 at pp. 1412-13 (1964) 1 SCR 515, *Marshall Sons & Co (I) Ltd v Sahi Oretrans (P) Ltd*, (1999) 2 SCC 325 AIR 1999 SC 882.

88. *Ibid.*, see also *Harry Kempson Gray v. Bhagu Mian*, AIR 1930 PC 82.

89. *Ibid.*, see also *R P David v M Thiagarajan*, 1996 AHC 1194, *Marshall Sons & Co (I) Ltd v Sahi Oretrans (P) Ltd*, (1999) 2 SCC 325 AIR 1999 SC 882.

90. *Chander Kali Bai v Jagdish Singh*, (1977) 4 SCC 402 AIR 1977 SC 2262, *Purifi arao Fernandes v Hugo Vicente de Perpetuo*, AIR 1985 Bom 202, *Ratilal Thakordas Tamkhurwala v Vitthaladas*, AIR 1985 Bom 134.

91. *Harry Kempson Gray v Bhagu Mian*, AIR 1930 PC 82.

**(h) Interest**

Since interest is an integral part of mesne profits, it has to be allowed in the computation of mesne profits itself.<sup>92</sup> The rate of interest is at the discretion of the court, subject to the limitation that the said rate shall not exceed six per cent per annum.<sup>93</sup> Such interest can be allowed till the date of payment.<sup>94</sup>

**(i) Deductions**

While awarding mesne profits, the court may allow deductions to be made from the gross profits of the defendant in wrongful possession of the property, such as land revenue, rent, cesses, cost of cultivation and reaping, the charges incurred for collection of rent, etc. In other words, mesne profits should be net profits.<sup>95</sup>

**(11) Public officer**

"Public officer" means a person falling under any of the descriptions in Section 2(17) of the Code.<sup>96</sup>

Thus, every Judge, every member of All India Service, every Gazetted Officer of Union, every officer of court of justice or of government, a Minister of a State, a Receiver, a village Headman, an Officer in the Indian Army, a Sheriff of Bombay, a Bench Clerk of a civil court, an Inspector of Police, a Custodian of Evacuee Property, Provident Fund Commissioner, an Advocate engaged by the Government on day fees, an Income Tax Officer, etc., are public officers. But a retired government servant, a Port Commissioner, a Liquidator under the Co-operative Societies Act, a Chairman of a Municipality, a Municipal Councillor, an officer of a Corporation, etc. are not public officers.

**3. OTHER IMPORTANT TERMS**

There are certain other terms. Though they are important, they have not been defined in the Code. It has been rightly said that where a word

92. *Mahant Narayana Dasjee v. Tirumalai Tirupathi Devasthanam*, AIR 1965 SC 1231 at p. 1235; *Lucy Kochuvareed v. P. Mariappa Gounder*, (1979) 3 SCC 150, paras 45, at pp. 54-58.

93. *Mahant Narayan Dasjee case*, AIR 1965 SC 1231 at p. 1236 (AIR).

94. *Lucy v. Mariappa*, (1979) 3 SCC 150, paras 45, at pp. 54-58; *Mahant Narayana Dasjee v. Tirumalai Tirupathi Devasthanam*, AIR 1965 SC 1231 at p. 1235.

95. *Dakshina v. Saroda*, (1892-93) 20 IA 160; ILR (1894) 21 Cal 142 (PC); see also, Pt. II, Chap. 15, *infra*.

96. S. 2(17).

is not defined in a statute, it is permissible to refer dictionaries to find out sense in which it is understood in common parlance.<sup>97</sup>

Let us consider some important terms not defined in the Code.

### (1) Affidavit

An affidavit is a declaration of facts, reduced to writing and affirmed or sworn before an officer having authority to administer oaths. It should be drawn up in the first person and contain statements and not inferences.<sup>98</sup>

### (2) Appeal

The expression "Appeal" may be defined as "the judicial examination of the decision by a higher court of the decision of an inferior court". It is a complaint made to a higher court that the decree passed by a lower court is wrong. It is a remedy provided by law for getting the decree of a lower court set aside. The right of appeal is a creature of a statute and unless it is granted clearly and expressly it cannot be claimed by a person. Again, it is a vested right and can be taken away only by a statutory provision, either expressly or by necessary implication.<sup>99</sup>

### (3) Cause of action

Cause of action may be described as "a bundle of essential facts, which it is necessary for the plaintiff to prove before he can succeed". A cause of action is the foundation of a suit. It must be antecedent to the institution of a suit and on the basis of it the suit must have been filed. If a plaint does not disclose a cause of action, a court will reject such plaint.<sup>100</sup>

### (4) Caveat

According to its dictionary meaning, a "caveat" is an official request that a court should not take a particular action without issuing notice to the party lodging the caveat and without affording an opportunity of hearing him.<sup>101</sup>

97. G P. Singh, *Principles of Statutory Interpretation* (2008) at p 338, see also *Union of India v Harjeet Singh Sandhu*, (2001) 5 SCC 593 AIR 2001 SC 1772.

98. For detailed discussion, see *infra*, Pt II, Chap 8

99. For detailed discussion, see *infra*, Pt III, Chap 2

100. For detailed discussion, see *infra*, Pt II Chap 7

101. For detailed discussion, see *infra*, Pt V, Chap 3

### (5) Civil

The word "civil" pertains to rights and remedies of a citizen as distinguished from criminal, political, etc. The expression "civil proceedings" covers all proceedings in which a party asserts civil rights conferred by a civil law.<sup>102</sup>

### (6) Court

"Court" is a place where justice is administered. To be a court, the person constituting it must have been entrusted with judicial functions.<sup>103</sup>

### (7) Defendant

Defendant means a person who defends or a person sued in a court of law by a plaintiff. In every suit there must be two parties, namely, the plaintiff and the defendant. A defendant is a person against whom a relief is claimed by a plaintiff.<sup>104</sup>

### (8) Execution

Stated simply, "execution" means "the process of enforcing or giving effect to the judgment, decree or order of a Court".<sup>105</sup>

### (9) Issue

According to the *Concise Oxford Dictionary*, "issue" means "a point in question, an important subject of debate or litigation".<sup>106</sup> Issues are of three kinds: (i) Issues of fact; (ii) Issues of law; and (iii) Mixed issues of fact and law. Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other.<sup>107</sup>

### (10) Jurisdiction

Stated simply, "jurisdiction" means authority to decide. "Jurisdiction" may be defined to be the power or authority of a court to hear and determine a cause, to adjudicate and exercise any judicial power in

102. For detailed discussion, see *infra*, Pt. II, Chap. 1.

103. For detailed discussion, see *infra*, Pt. II, Chap. 1.

104. *Concise Oxford Dictionary* (1990) at p. 303; *Chamber's 20th Century Dictionary* (1976) at p. 338.

105. For detailed discussion, see *infra*, Pt. IV "Execution".

106. *Concise Oxford Dictionary* (1990) at p. 630.

107. For detailed discussion, see *infra*, Pt. II, Chap. 10.

relation to it. Jurisdiction means the extent of the authority of a court to administer justice prescribed with reference to subject-matter, pecuniary value and territorial limits. Consent can neither confer nor take away jurisdiction of a court.<sup>108</sup>

### (11) Complaint

A "Complaint" is a statement of claim, a document, or a memorial by the presentation of which a suit is instituted. It contains the grounds on which the assistance of a court is sought by a plaintiff. It is a pleading of the plaintiff.<sup>109</sup>

### (12) Plaintiff

Plaintiff is a person who brings a suit or commences an action against a defendant. It is the plaintiff who approaches a court of law by filing a suit for reliefs claimed in the plaint.<sup>110</sup>

### (13) Suit

The word "suit" ordinarily means a civil proceeding instituted by the presentation of a plaint. In its comprehensive sense, the word "suit" is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law permits.<sup>111</sup>

### (14) Summons

A summons is a document issued from an office of a court of justice, calling upon the person to whom it is directed to attend before a judge or an officer of the court for a certain purpose. It is a written order that legally obligates someone to attend a court of law at a specified date.<sup>112</sup>

When a plaintiff files a suit, the defendant must be informed about it. The intimation which is sent to the defendant by the court is technically known as "summons". A summons can also be issued to witnesses. Service of summons can be effected in any of the modes recognised by the Code.<sup>113</sup>

108 For detailed discussion, see *infra*, Pt. II, Chap. 1

109. For detailed discussion, see *infra*, Pt. II, Chap. 5.

110. *Concise Oxford Dictionary* (1990) at p. 910, *Chamber's 21st Century Dictionary* (1997) at p. 1060.

111 For detailed discussion, see *supra*, "Decree", *infra* Pt. II, Chap. 2

112 *Concise Oxford Dictionary* (1990) at p. 1395, *Chamber's 21st Century Dictionary* (1997) at p. 1414.

113 For detailed discussion, see *infra*, Pt. II, Chap. 7.

**(15) Written statement**

Written statement may be defined as a reply of a defendant to the plaint filed by a plaintiff. Thus, it is a pleading of a defendant dealing with every material fact of a plaint. It may also contain new facts in favour of a defendant or legal objections against the claim of a plaintiff. It is a pleading of a defendant.<sup>114</sup>

114. For detailed discussion, see *infra*, Pt. II, Chap. 7.



Part II  
Suits



# CHAPTER 1

## Jurisdiction of Civil Courts

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### 1. GENERAL

The fundamental principle of English Law that wherever there is a right, there is a remedy (*ubi jus ibi remedium*) has been adopted by the Indian legal system also. In fact, right and remedy are but the two sides of the same coin and they cannot be separated from each other. Accordingly, a litigant having a grievance of a civil nature has a right to institute a civil suit in a competent civil court unless its cognizance is either expressly or impliedly barred by any statute.<sup>1</sup> A suit for its

1. *Abdul Waheed Khan v. Bhawani*, AIR 1966 SC 1718 at p. 1719; (1966) 3 SCR 617; *Brij Raj Singh v. Laxman Singh*, AIR 1961 SC 149 at p. 152. (1961) 1 SCR 616, *Most Rev. P.M.A. Metropolitan v. Moran Mar Marthoma*, 1995 Supp (4) SCC 286 at p. 318; AIR 1995 SC 2001 at p. 2022.

maintainability requires no authority of law and it is enough that no statute bars it.<sup>2</sup>

## 2. JURISDICTION: MEANING

The term "jurisdiction" has not been defined in the Code. The word (jurisdiction) is derived from Latin terms "*juris*" and "*dicto*" which means "I speak by the law."

Stated simply, "jurisdiction" means the power or authority of a court of law to hear and determine a cause or a matter. It is the power to entertain, deal with and decide a suit, an action, petition or other proceeding.<sup>3</sup> In other words, by jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision.<sup>4</sup>

Thus, jurisdiction of a court means the extent of the authority of a court to administer justice prescribed with reference to the subject-matter, pecuniary value and local limits.<sup>5</sup>

In *Official Trustee v. Sachindra Nath*<sup>6</sup>, after referring to various decisions, the Supreme Court observed:

"From the above discussion it is clear that before a court can be held to have jurisdiction to decide a particular matter it must not only have jurisdiction to try the suit brought but must also have the authority to pass the orders sought for. It is not sufficient that it has some jurisdiction in relation to the subject-matter of the suit. *Its jurisdiction must include the power to hear and decide the question at issue, the authority to hear and decide the particular controversy that has arisen between the parties.*"<sup>7</sup> (emphasis supplied)

2. *Ganga Bai v. Vijay Kumar*, (1974) 2 SCC 393 at p. 397; AIR 1974 SC 1126 at p. 1129; *Most Rev. P.M.A. Metropolitan v. Moran Mar Marthoma*, 1995 Supp (4) SCC 286 at p. 318.
3. *Concise Oxford English Dictionary* (2002) at p. 768, P.R. Aiyar, *Advanced Law Lexicon* (2005) Vol. III at pp. 2527-30; Justice C.K. Thakker, *Encyclopaedic Law Lexicon* (2009) Vol. II at pp. 2500-04.
4. *Official Trustee v. Sachindra Nath*, AIR 1969 SC 823 at p. 827; (1969) 3 SCR 92, *Ujjam Bai v. State of U.P.*, AIR 1962 SC 1621 at p. 1629; (1963) 1 SCR 778, *Raja Soap Factory v S P Shantharaj*, AIR 1965 SC 1449; (1965) 2 SCR 800.
5. *Raja Soap Factory v. S.P. Shantharaj*, AIR 1965 SC 1449. (1965) 2 SCR 800
6. AIR 1969 SC 823; (1969) 3 SCR 92.
7. *Ibid*, at p. 828 (AIR), see also *Union of India v Tarachand Gupta and Bros*, (1971) 1 SCC 486; AIR 1971 SC 1558; *Anisminic Ltd v. Foreign Compensation Commission*, (1969) 1 All ER 208 (1969) 2 WLR 163 (1969) 2 AC 147 (HL). See also, the following statement of law in *Halsbury's Laws of England* (4th Edn.) Vol. 10, para 715.

"By jurisdiction is meant authority by which a Court has to decide matters that are litigated before it, or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by Statute or Charter or Commission under which the Court is constituted and may be extended or restricted by similar means. If no restriction or limitation is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind or nature of the actions or the matters of which a particular Court has cognizance or as

### 3. JURISDICTION AND CONSENT

It is well-settled that consent cannot confer nor take away jurisdiction of a court. In the leading case of *A.R. Antulay v. R.S. Nayak*<sup>8</sup>, Mukharji, J. (as he then was) stated, "This Court, by its directions, could not confer jurisdiction on the High Court of Bombay to try any case for which it did not possess ..."

It was further stated:

"The power to create or enlarge jurisdiction is legislative in character, so also the power to confer a right of appeal or to take away right of appeal. Parliament alone can do it by law and no court, whether superior or inferior or both combined, can enlarge the jurisdiction of a court or divest a person of his rights of revision and appeal."<sup>9</sup>

If the court has no inherent jurisdiction, neither acquiescence nor waiver nor estoppel can create it.<sup>10</sup> A defect of jurisdiction goes to the root of the matter and strikes at the authority of a court to pass a decree. Such a basic and fundamental defect cannot be cured by consent of parties and the judgment or order passed by a court, however precisely certain and technically correct, is null and void and the validity thereof can be challenged at any stage.<sup>11</sup> A decree passed without jurisdiction is non est and its validity can be set up whenever it is sought to be enforced as a foundation for a right, even at the stage of execution or in collateral proceedings. In short, a decree passed by a court without jurisdiction is a *coram non judice*.<sup>12</sup>

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to the area over which the jurisdiction extends, or it may partake of both these characteristics."

8. (1988) 2 SCC 602 at p. 650: AIR 1988 SC 1531

9. *Ibid*, at p. 650 (SCC).

10. *Dhirendra Nath v. Sudhir Chandra*, AIR 1964 SC 1300 at p. 1304; (1964) 6 SCR 1001; *Chief Justice of A.P. v. L.V.A. Dixitulu*, (1979) 2 SCC 34 at p. 42; AIR 1979 SC 193 at p. 198; *Nai Bahu v. Lala Ramnarayan*, (1978) 1 SCC 58 at pp. 61-62; AIR 1978 SC 22 at p. 25; *Globe Transport Corp'n v. Triveni Engg Works*, (1983) 4 SCC 707 at p. 709; *Bahrain Petroleum Co. Ltd. v. P.J. Pappu*, AIR 1966 SC 634 at p. 636; (1966) 1 SCR 461; *Hira Lal v. Kali Nath*, AIR 1962 SC 199 at p. 201; (1962) 2 SCR 747; *Khardah Co. Ltd. v. Raymon & Co. India (P) Ltd.*, AIR 1962 SC 1810 at pp. 1815-16; (1963) 3 SCR 183; *United Commercial Bank Ltd. v. Workmen*, AIR 1951 SC 230 at pp. 237-42; 1950 SCR 380; *Patel Roadways Ltd. v. Prasad Trading Co.*, (1991) 4 SCC 270. AIR 1992 SC 1514; *Chiranjilal v. Jasjit Singh*, (1993) 2 SCC 507; *Harshad Chiman Lal Modi v. DLF Universal Ltd.*, (2005) 7 SCC 791; AIR 2005 SC 4446; *Modi Entertainment Network v. W.S.G. Cricket PTE. Ltd.*, (2003) 4 SCC 341 (351); AIR 2003 SC 1177.

11. *Ibid*, see also *Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman*, (1970) 1 SCC 670. AIR 1970 SC 1475; *Chandrika Misir v. Bhairya Lal*, (1973) 2 SCC 474 at p. 476; AIR 1973 SC 2391 at p. 2393.

12. *Ibid*, see also *Sushil Kumar v. Gobind Ram*, (1990) 1 SCC 193 at p. 205; *Isabella Johnson v. M.A. Susai*, (1991) 1 SCC 494 at p. 498. AIR 1991 SC 993 at p. 995; *Patel Roadways Ltd. v. Prasad Trading Co.*, (1991) 4 SCC 270; AIR 1992 SC 1514; *Harshad Chiman Lal Modi v. DLF Universal Ltd.*, (2005) 7 SCC 791; AIR 2005 SC 4446, *Chief Engineer, Hydrel Project v. Ravinder Nath*, (2008) 2 SCC 350.

In the case of *Kiran Singh v. Chaman Paswan*<sup>13</sup>, the Supreme Court observed:

"It is a fundamental principle well-established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction ... strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties."<sup>14</sup>

(emphasis supplied)

Conversely, where a court has jurisdiction to decide a dispute, the same cannot be taken away or ousted by consent of parties. An agreement to oust *absolutely* the jurisdiction of the court would be unlawful and void, being against public policy (*ex dolo malo non oritur actio*).<sup>15</sup> But if two or more courts have jurisdiction to try the suit, it is open to the parties to select a particular forum and exclude the other forums. And, therefore, the parties may agree among themselves that the suit should be brought in one of those courts and not in the other, since there is no inherent lack of jurisdiction in the court. Such an agreement would be legal, valid and enforceable.<sup>16</sup>

#### 4. LACK OF JURISDICTION AND IRREGULAR EXERCISE OF JURISDICTION

There is always a distinction between want of jurisdiction and irregular exercise of it. Once it is held that a court has jurisdiction to entertain and decide a matter, the correctness of the decision given cannot be said to be without jurisdiction inasmuch as the power to decide necessarily carries with it the power to decide wrongly as well as rightly.<sup>17</sup>

13. AIR 1954 SC 340 (1955) 1 SCR 117.

14. *Ibid*, at p. 342 (AIR), see also *Sushil Kumar v. Gobind Ram*, (1990) 1 SCC 193.

15. *A.B.C. Laminart (P) Ltd. v. A.P. Agencies*, (1989) 2 SCC 163 at p. 170; AIR 1989 SC 1239. *Supdt. of Taxes v. Onkarmal Nathmal Trust*, (1976) 1 SCC 766; AIR 1975 SC 2065 at p. 2071; *Reiva Mahlon v. Ram Kishen*, (1885-86) 13 IA 106 at p. 111 (PC).

16. *Hakam Singh v. Gammon (India) Ltd.*, (1971) 1 SCC 286; AIR 1971 SC 740. *Globe Transport Corpn. v. Triveni Engg. Works*, (1983) 4 SCC 707 at p. 709; *A B C Laminart (P) Ltd v A P Agencies*, (1989) 2 SCC 163, *R S D V Finance Co (P) Ltd v Shree Vallabh Glass Works Ltd*, (1993) 2 SCC 130; AIR 1993 SC 2094, *Shree Subhlaxmi Fabrics (P) Ltd v Chand Mal*, (2005) 10 SCC 704 *Laxman Prasad v. Prodigy Electronics Ltd.*, (2008) 1 SCC 618

17. *Ujjam Bai v. State of U P*, AIR 1962 SC 1621 at p. 1629 (1963) 1 SCR 778 *Rajendra Iha v. Labour Court*, 1984 Supp SCC 520 at pp. 526-27 AIR 1984 SC 1696 at pp. 1699-700 *Ebrahim Aboobakar v. Custodian General of Evacuee Property*, AIR 1952 SC 319 1952 SCR 696. *S. Govinda Menon v. Union of India*, AIR 1967 SC 1274 (1967) 2 SCR 566. *Ithayavira Mathai Mathai v. Varkey Varkey*, AIR 1964 SC 907 (1964) 1 SCR 495

In the words of Lord Hobhouse,<sup>18</sup> "A court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken, the decision, however wrong, cannot be disturbed."

In other words, if there is inherent lack of jurisdiction, the decree passed by a civil court is a nullity, and that nullity can be set up in any collateral proceedings.<sup>19</sup> However, if a court has jurisdiction but it is irregularly exercised, the defect does not go to the root of the matter, and the error, if any, in exercising the jurisdiction can be remedied in appeal or revision and when there is no such remedy or is not availed of, the decision is final.

In *Ittyavira Mathai Mathai v. Varkey Varkey*<sup>20</sup>, it was contended that the decree passed by the court was a nullity since the suit was time barred. Negating that contention, the Supreme Court observed:

"If the suit was barred by time and yet, the court decreed it, the court would be committing an illegality and therefore the aggrieved party would be entitled to have the decree set aside by preferring an appeal against it. But it is well-settled that a court having jurisdiction over the subject-matter of the suit and over parties thereto though bound to decide right may decide wrong; and that even though it decided wrong it would not be doing something which it had no jurisdiction to do ... If the party aggrieved does not take appropriate steps to have that error corrected, the erroneous decree will hold good and will not be open to challenge on the basis of being a nullity."<sup>21</sup> (emphasis supplied)

The difficult question, however, is: What is the distinction between absence of jurisdiction and erroneous or irregular exercise thereof?

After the landmark decision in *Anisminic Ltd. v. Foreign Compensation Commission*<sup>22</sup>, the legal position is considerably changed. It virtually assimilated the distinction between lack of jurisdiction and erroneous exercise thereof. As observed in *M.L. Sethi v. R.P. Kapur*<sup>23</sup>, the difference

18. *Ibid*, see also *Malkarjun Bin Shidramappa v. Narhari Bin Shivappa*, (1899-1900) 27 IA 216; ILR (1901) 25 Bom 337 (PC), 568, *Supdt. of Taxes v. Onkarmal Nathmal Trust*, (1976) 1 SCC 766; AIR 1975 SC 2065 at p. 2071.

19. *Amrit Bhikaji Kale v. Kashinath Janardhan Trade*, (1983) 3 SCC 437 at p. 444; AIR 1983 SC 643 at p. 647.

20. AIR 1964 SC 907; (1964) 1 SCR 495.

21. *Ittyavira Mathai Mathai v. Varkey Varkey*, AIR 1964 SC 907 at p. 910; (1964) 1 SCR 495; see also *Ujjam Bai v. State of U.P.*, AIR 1962 SC 1621 at pp. 1629-30; (1963) 1 SCR 778; *Rajendra Jha case*, 1984 Supp SCC 520; *Chittoori v. Kudappa*, AIR 1965 SC 1325. (1965) 2 SCR 661. See also, the following observations of S.K. Das, J. (as he then was) in *Ujjam Bai v. State of U.P.*, AIR 1962 SC 1621 at p. 1629; (1963) 1 SCR 778.

"Where a quasi-judicial authority has jurisdiction to decide a matter, it does not lose its jurisdiction by coming to a wrong conclusion, whether it is wrong in law or in fact."

22. (1969) 2 AC 147; (1969) 2 WLR 163; (1969) 1 All ER 208 (HL).

23. (1972) 2 SCC 427 at p. 435; AIR 1972 SC 2379 at p. 2385.

between jurisdictional error and error of law within jurisdiction has been reduced almost to a vanishing point.

The following observations<sup>24</sup> pithily put the legal position thus:

*"After Anisminic every error of law is a jurisdictional error ... The distinction between jurisdictional and non-jurisdictional error is ultimately based upon a foundation of sand. Much of the superstructure has already crumbled. What remains is likely quickly to fall away as the courts rightly insist that all administrative actions should be simply lawful whether or not jurisdictionally lawful."*<sup>25</sup>  
(emphasis supplied)

## 5. BASIS TO DETERMINE JURISDICTION

It is well-settled that for deciding the jurisdiction of a civil court, the averments made in the plaint are material. To put it differently, the jurisdiction of a court should normally be decided on the basis of the case put forward by the plaintiff in his plaint and not by the defendant in his written statement.

Thus, in *Abdulla Bin Ali v. Galappa*<sup>26</sup>, the plaintiff filed a suit in the civil court for declaration of title and for possession and mesne profits treating the defendants as trespassers. The defendants contended that the civil court had no jurisdiction since he was a tenant.

Negating the contention of the defendants, the Supreme Court observed, "There is no denying the fact that the allegations made in plaint decide the forum. The jurisdiction does not depend upon the defence taken by the defendants in the written statement. On a reading of the plaint as a whole it is evident that the plaintiffs-appellants had filed the suit giving rise to the present appeal treating the defendants as trespassers as they denied the title of the plaintiffs-appellants. Now a suit against the trespasser would lie only in the civil court and not in the Revenue Court ... We are, therefore, of the considered opinion that on the allegations made in the plaint the suit was cognizable by the civil court."<sup>27</sup>

(emphasis supplied)

The plaintiff, however, cannot by drafting his plaint cleverly circumvent the provisions of law in order to invest jurisdiction in civil court

24 De Smith, *Judicial Review of Administrative Action* (5th Edn.) at p. 256.

25 Readers interested in analytical discussion may refer to Authors' *Code of Civil Procedure* (Lawyers' Edn.) Vol. I at pp 53-60; Authors' *Administrative Law* (2012) Chap. 10, Authors' *Lectures on Administrative Law* (2012), Lecture 9.

26 (1985) 2 SCC 54; AIR 1985 SC 577.

27 *Ibid*, n 23 at pp 56-57 (SCC) at p 579 (AIR); see also *Bismillah v. Janeshwar Prasad*, (1990) 1 SCC 207 at pp 210-11 AIR 1990 SC 540, *Sanwarmal Kejriwal v. Vishwa Coop Housing Society Ltd.*, (1990) 2 SCC 288 at pp 306-07 AIR 1990 SC 1563, *Vasudev Gopal v. Happy Home Coop Housing Society Ltd.*, AIR 1967 SC 369 (1964) 3 SCR 964, *Mani Nariman v. Phiroz N. Bhatena*, (1991) 3 SCC 141 AIR 1991 SC 1494, *Begum Sabiha v. Nawab Mohd Mansur*, (2007) 4 SCC 343 AIR 2007 SC 1636.

which it does not possess.<sup>28</sup> It is also well established that in deciding the question of jurisdiction, what is important is the substance of the matter and not the form.<sup>29</sup>

Thus, in *Bank of Baroda v. Moti Bhai*<sup>30</sup>, the plaintiff Bank lent a certain amount to the defendant in the usual course of its commercial business. By way of a collateral security, however, it obtained a hypothecation bond and a deed of mortgage from the defendant under the Tenancy Act conferring exclusive jurisdiction on the revenue court. When the suit was filed in the civil court for recovery of amount, it was contended by the defendant that the civil court had no jurisdiction to try the suit.

Negating the contention, the Supreme Court observed that the business of the bank was to lend money. If only by way of collateral security the bank obtains a hypothecation bond or a deed of mortgage, the provisions of the Tenancy Act cannot be attracted. Primarily and basically, the suit filed by the bank was for the recovery of the amount due to it by the defendant on the basis of the promissory note executed by the defendant. The main relief sought by the bank was that the suit should be decreed for repayment of amount. The civil court had, therefore, jurisdiction to entertain the suit filed by the bank. *On the question of jurisdiction, one must always have regard to the substance of the matter and not to the form of the suit.*<sup>31</sup> (emphasis supplied)

Again, when a court of limited jurisdiction (Rent Controller) has jurisdiction to decide only a particular dispute (fixation of standard rent), it has jurisdiction to consider the collateral issue (title of the landlord to the property) only prima facie and the jurisdiction of a civil court to decide such issue finally is not taken away.<sup>32</sup>

It is submitted that the following observations of the Full Bench of the Allahabad High Court in *Ananti v. Chhannu*<sup>33</sup>, and approved by the Supreme Court<sup>34</sup>, lay down the correct law on the point:

"The plaintiff chooses his forum and files his suit. If he establishes the correctness of his facts he will get his relief from the forum chosen. If ... he frames his suit in a manner not warranted by the facts, and goes for his relief to a court which cannot grant him relief on the true facts, he will have his suit dismissed. Then there will be no question of returning the plaint for presentation to the proper court, for the plaint, as framed, would

28. *Ram Singh v. Mehal Kalan Gram Panchayat*, (1986) 4 SCC 364: AIR 1986 SC 2197; *ONGC v. Utpal Kumar Basu*, (1994) 4 SCC 711.

29. *Moolji Jaitha and Co. v. Khandesh Spg. and Wvg. Mills Co. Ltd.*, AIR 1950 FC 83 at p. 92; *Begum Sabiha v. Nawab Mohd. Mansur*, (2007) 4 SCC 343.

30. (1985) 1 SCC 475: AIR 1985 SC 545.

31. *Ibid.*, at p. 478 (SCC): at p. 547 (AIR). See also *Bismillah v. Janeshwar Prasad*, (1990) 1 SCC 207; *Ram Singh v. Gram Panchayat Mehal Kalan*, (1986) 4 SCC 364: AIR 1986 SC 2197.

32. *LIC v. India Automobiles & Co.*, (1990) 4 SCC 286: AIR 1991 SC 884.

33. AIR 1930 All 193; ILR (1930) 52 All 501 (FB).

34. *Topandas v. Gorakhram*, AIR 1964 SC 1348. (1964) 3 SCR 214.

not justify the other kind of court to grant him the relief ... If it is found, on a trial on the merits so far as this issue of jurisdiction goes, that the facts alleged by the plaintiff are not true and the facts alleged by the defendants are true, and that the case is not cognizable by the court, there will be two kinds of orders to be passed. *If the jurisdiction is only one relating to territorial limits or pecuniary limits, the plaint will be ordered to be returned for presentation to the proper court. If, on the other hand, it is found that, having regard to the nature of the suit, it is not cognizable by the class of court to which the court belongs, the plaintiff's suit will have to be dismissed in its entirety.*"<sup>35</sup>

(emphasis supplied)

## 6. JURISDICTIONAL FACT

The jurisdiction of a court, tribunal or authority may depend upon fulfilment of certain conditions or upon existence of a particular fact. This is called "jurisdictional fact". The existence of such a preliminary or collateral fact is a *sine qua non* or a condition precedent to the assumption of jurisdiction by the authority. If it exists, the authority has jurisdiction and it can act. If it does not exist, there is no jurisdiction and the authority cannot act. If the authority wrongly assumes existence of such fact, a writ of *certiorari* can be issued.<sup>36</sup>

## 7. DECISION AS TO JURISDICTION

Whether a court has jurisdiction or not has to be decided with reference to the initial assumption of jurisdiction by that court. The question depends not on the truth or falsehood of the facts into which it has to enquire, or upon the correctness of its findings on these facts, but upon their nature, and it is determinable "at the commencement, not at the conclusion of the inquiry".<sup>37</sup>

Whenever the jurisdiction of a court is challenged, that court has inherent jurisdiction to decide the said question.<sup>38</sup> Every court or

35 *Ibid.* at p 1352 (AIR)

36. *Anisminic Ltd v. Foreign Compensation Commission*, 1969) 2 AC 147 (1969) 2 WLR 163 (1969) 1 All ER 208 (HL); *Ebrahim Aboobakar v. Custodian-General of Evacuee Property*, AIR 1952 SC 319; 1952 SCR 696, *Ujjam Bai v. State of U P.*, AIR 1962 SC 1621 (1963) 1 SCR 778. For detailed discussion, see, V.G. Ramachandran, *Law of Writs* (1993) at pp. 747-54; Authors' *Code of Civil Procedure* (Lawyers' Edn.) Vol. I at pp. 62-64; Authors' *Administrative Law* (2012) Chap. 10; Authors' *Lectures on Administrative Law* (2012), Lecture 9.

37. *R v Boltan*, (1841) 1 QB 66 (1835-42) All ER Rep 71, *Ujjam Bai case*, AIR 1962 SC 1621 at p 1629.

38. *Bhatta Coop Housing Society Ltd v D C Patel*, AIR 1953 SC 16 at p 19 1953 SCR 185, *Athmanathaswami Devasthanam v K Gopalswami Ayyangar*, AIR 1965 SC 338 at p. 342 (1964) 3 SCR 763, *LIC v. India Automobiles & Co.*, (1990) 4 SCC 286 at pp 293-94 AIR 1991 SC 884 at p 889.

tribunal is not only entitled but bound to determine whether the matter in which it is asked to exercise its jurisdiction comes within its jurisdiction or not.<sup>39</sup> Similarly, where a tribunal derives its jurisdiction from the statute that creates it and imposes conditions under which it can function, it goes without saying that before the tribunal assumes jurisdiction in a matter, it must be satisfied that those conditions in fact exist. Such facts are known as preliminary or jurisdictional facts.<sup>40</sup>

## 8. COURTS AND TRIBUNALS

A civil court has inherent power to decide the question whether it has jurisdiction to entertain, deal with and decide the matter which has come before it.<sup>41</sup>

The jurisdiction of a tribunal or any other authority stands on a different footing. Where Parliament has invested such tribunal with the power to decide and determine *finally* the preliminary facts on which its jurisdiction depends, it can decide such facts and the finding recorded by the tribunal cannot be challenged by *certiorari*. But where a statute creating or establishing a tribunal does not confer that power on a tribunal, an inferior tribunal cannot, on a wrong decision on preliminary or collateral fact, assume and confer on itself jurisdiction which it does not possess. Such an order can be challenged by *certiorari*.<sup>42</sup>

## 9. JURISDICTION OF FOREIGN COURTS<sup>43</sup>

## 10. KINDS OF JURISDICTION

Jurisdiction of a court may be classified under the following categories:

39. *Ibid*, see also *Mohd. Hasnuddin v. State of Maharashtra*, (1979) 2 SCC 572 at p. 584; AIR 1979 SC 404 at p. 412.
40. For discussion about "Jurisdictional fact", see, *Authors' Lectures on Administrative Law* (2012) Lecture 9; *Authors' Administrative Law* (2012) Chap. 10.
41. *Bhatia Coop. Housing Society Ltd. v. D C. Patel*, AIR 1953 SC 16 at p. 19. 1953 SCR 185; *Athmanathaswami Devasthanam v. K. Gopalswami Ayyangar*, AIR 1965 SC 338 at p. 342; (1964) 3 SCR 763; *Official Trustee v. Sachindra Nath*, AIR 1969 SC 823 at p. 828. (1969) 3 SCR 92; *LIC v. India Automobiles & Co.*, (1990) 4 SCC 286 at p. 293-94 AIR 1991 SC 884 at p. 889.
42. *Ibid*, see also *Ujjam Bai v. State of U.P.*, AIR 1962 SC 1621; (1963) 1 SCR 778; *Chaube Jagdish Prasad v. Ganga Prasad Chaturvedi*, AIR 1959 SC 492. 1959 Supp (1) SCR 733; *Addanki T T. Desika v. State of A.P.*, AIR 1964 SC 807; *R. v. Commr. for Special Purposes of Income Tax*, (1888) 21 QB 313; 36 WR 776, *BASF Styrenics (P) Ltd. v. Offshore Industrial Construction (P) Ltd.*, AIR 2002 Bom 289.
43. For detailed discussion, see *infra*, Chap. 3.

### **(1) Civil and criminal jurisdiction**

Civil jurisdiction is that which concerns and deals with disputes of a "civil nature". Criminal jurisdiction, on the other hand, relates to crimes and punishes offenders.

### **(2) Territorial or local jurisdiction**

Every court has its own local or territorial limits beyond which it cannot exercise its jurisdiction. These limits are fixed by the Government. The District Judge has to exercise jurisdiction within his district and not outside it. The High Court has jurisdiction over the territory of a State within which it is situate and not beyond it. Again, a court has no jurisdiction to try a suit for immovable property situated beyond its local limits.

### **(3) Pecuniary jurisdiction**

The Code provides that a court will have jurisdiction only over those suits the amount or value of the subject-matter of which does not exceed the pecuniary limits of its jurisdiction.<sup>44</sup> Some courts have unlimited pecuniary jurisdiction, e.g. High Courts and District Courts have no pecuniary limitations. But there are other courts having jurisdiction to try suits up to a particular amount. Thus, a Presidency Small Causes Court cannot entertain a suit in which the amount claimed exceeds Rs 1000.

### **(4) Jurisdiction as to subject-matter**

Different courts have been empowered to decide different types of suits. Certain courts are precluded from entertaining certain suits. Thus, a Presidency Small Causes Court has no jurisdiction to try suits for specific performance of a contract, partition of immovable property, foreclosure or redemption of a mortgage, etc. Similarly, in respect of testamentary matters, divorce cases, probate proceedings, insolvency proceedings, etc., only the District Judge or Civil Judge (Senior Division) has jurisdiction.

### **(5) Original and appellate jurisdiction**

Original jurisdiction is jurisdiction inherent in, or conferred upon, a court of first instance. In the exercise of that jurisdiction, a court of first instance decides suits, petitions or applications. Appellate jurisdiction

is the power or authority conferred upon a superior court to re-hear by way of appeal, revision, etc., of causes which have been tried and decided by courts of original jurisdiction.

Munsiffs Courts, Courts of Civil Judges, Small Cause Courts are having original jurisdiction only, while District Courts, High Courts have original as well as appellate jurisdiction.

#### **(6) Exclusive and concurrent jurisdiction**

Exclusive jurisdiction is that which confers sole power on one court or tribunal to try, deal with and decide a case. No other court or authority can render a judgment or give a decision in the case or class of cases.

Concurrent or co-ordinate jurisdiction is jurisdiction which may be exercised by different courts or authorities between the same parties, at the same time and over the same subject-matter. It is, therefore, open to a litigant to invoke jurisdiction of any of such court or authority.

#### **(7) General and special jurisdiction**

General jurisdiction extends to all cases comprised within a class or classes of causes. Special or limited jurisdiction, on the other hand, is jurisdiction which is confined to special, particular or limited causes.

#### **(8) Legal and equitable jurisdiction**

Legal jurisdiction is a jurisdiction exercised by Common Law Courts in England, while equitable jurisdiction is a jurisdiction exercised by Equity Courts. Courts in India are courts of both, law and equity.

#### **(9) Municipal and foreign jurisdiction**

Municipal or domestic jurisdiction is a jurisdiction exercised by municipal courts, i.e., courts in a country. Foreign jurisdiction means jurisdiction exercised by a court in a foreign country. A judgment rendered or decision given by a foreign court is a "foreign judgment".

#### **(10) Expounding and expanding jurisdiction**

Expounding jurisdiction means to define, clarify and explain jurisdiction. Expanding jurisdiction means to expand, enlarge or extend the jurisdiction. It is the duty of the court to expound its jurisdiction. It is, however, not proper for the court to expand its jurisdiction.

## 11. JURISDICTION OF CIVIL COURTS

### (1) Section 9

Under the Code of Civil Procedure, a civil court has jurisdiction to try all suits of a civil nature unless they are barred. Section 9 of the Code reads as under:

"The Court shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

*Explanation I.*—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

*Explanation II.*—For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place."

### (2) Conditions

A civil court has jurisdiction to try a suit if two conditions are fulfilled:

- (i) The suit must be of a civil nature; and
- (ii) The cognizance of such a suit should not have been expressly or impliedly barred.

#### (a) Suit of civil nature

(i) *Meaning.*—In order that a civil court may have jurisdiction to try a suit, the first condition which must be satisfied is that the suit must be of a civil nature. But what is a suit of a civil nature? The word "civil" has not been defined in the Code. But according to the dictionary meaning,<sup>45</sup> it pertains to private rights and remedies of a citizen as distinguished from criminal, political, etc. The word "nature" has been defined as "the fundamental qualities of a person or thing; identity or essential character; sort, kind, character". It is thus wider in content. The expression "civil nature" is wider than the expression "civil proceeding".<sup>46</sup> Thus, a suit is of a civil nature if the principal question therein relates to the determination of a civil right and enforcement thereof. It is not the status of the parties to the suit, but the subject-matter of it which determines whether or not the suit is of a civil nature.

45 *Concise Oxford Dictionary* (1990) at p. 206 see also *S A L Narayan v Ishwarlal* AIR 1965 SC 1818 at p. 1823 (1966) 1 SCR 190 *Ramesh v Gendalal*, AIR 1966 SC 1445 at p. 1447-48 (1966) 3 SCR 198, *Arbind Kumar v Nand Kishore*, AIR 1968 SC 1227 (1968) 3 SCR 322.

46 *Most Rev. PM A Metropolitan v Moran Mar Marthoma*, 1995 Supp (4) SCC 286 at pp. 318-19 AIR 1995 SC 2001 at pp. 2022-23.

(ii) *Nature and scope.*—The expression “suit of a civil nature” will cover private rights and obligations of a citizen. Political and religious questions are not covered by that expression. A suit in which the principal question relates to caste or religion is not a suit of a civil nature. But if the principal question in a suit is of a civil nature (the right to property or to an office) and the adjudication incidentally involves the determination relating to a caste question or to religious rights and ceremonies, it does not cease to be a suit of a civil nature and the jurisdiction of a civil court is not barred.<sup>47</sup> The court has jurisdiction to adjudicate upon those questions also in order to decide the principal question which is of a civil nature.<sup>48</sup> Explanation II has been added by the Amendment Act of 1976. Before this Explanation, there was a divergence of judicial opinion as to whether a suit relating to a religious office to which no fees or emoluments were attached can be said to be a suit of a civil nature. But the legal position has now been clarified by Explanation II which specifically provides that a suit relating to a religious office is maintainable whether or not it carries any fees or whether or not it is attached to a particular place.

(iii) *Doctrine explained.*—Explaining the concept of jurisdiction of civil courts under Section 9, in *Most Rev. P.M.A. Metropolitan v. Moran Mar Marthoma*<sup>49</sup>, the Supreme Court stated:

“The expansive nature of the section is demonstrated by use of phraseology both positive and negative. The earlier part opens the door widely and latter debars entry to only those which are expressly or impliedly barred. The two explanations, one existing from inception and latter added in 1976 bring out clearly the legislative intention of extending operation of the section to such religious matters where right to property or office is involved irrespective of whether any fee is attached to the office or not. The language used is simple but explicit and clear. It is structured on the basic principle of a civilised jurisprudence that absence of machinery for enforcement of right renders it nugatory. The heading which is normally key to the section brings out unequivocally that all civil suits are cognizable unless barred. What is meant by it is explained further by widening the ambit of the section by use of the word ‘shall’ and the expression ‘all suits of a civil nature’ unless ‘expressly or impliedly barred’.

Each word and expression casts an obligation on the Court to exercise jurisdiction for enforcement of right. The word ‘shall’ makes it mandatory. No Court can refuse to entertain a suit if it is of the description mentioned in the section. That is amplified by the use of the expression, ‘all suits of civil nature’. The word ‘civil’ according to the dictionary means, ‘relating to the citizen as an individual; civil rights’. In *Black’s Law Dictionary* it is defined as, ‘relating to provide rights and remedies sought by civil actions

47. Expln. I to S. 9.

48. *Sinha Ramanuja v. Ranga Ramanuja*, AIR 1961 SC 1720: (1962) 2 SCR 509.

49. 1995 Supp (4) SCC 286: AIR 1995 SC 2001.

as contrasted with criminal proceedings'. In law it is understood as an antonym of criminal. Historically the two broad classifications were civil and criminal. Revenue, tax and company, etc. were added to it later. But they too pertain to the larger family of 'civil'. There is thus no doubt about the width of the word 'civil'. Its width has been stretched further by using the word 'nature' along with it. That is even those suits are cognizable which are not only civil but are even of civil nature ....

The word 'nature' has been defined as 'the fundamental qualities of a person or thing; identity or essential character, sort; kind; character'. It is thus wider in content. The word 'civil nature' is wider than the word 'civil proceeding'. *The section would, therefore, be available in every case where the dispute was of the characteristic of affecting one's rights which are not only civil but of civil nature.*<sup>50</sup> (emphasis supplied)

(iv) *Test.*—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of a question as to religious rites or ceremonies.<sup>51</sup>

(v) *Suits of civil nature: Illustrations.*—The following are suits of a civil nature:

- (i) Suits relating to rights to property;
- (ii) Suits relating to rights of worship;
- (iii) Suits relating to taking out of religious processions;
- (iv) Suits relating to right to shares in offerings;
- (v) Suits for damages for civil wrongs;
- (vi) Suits for specific performance of contracts or for damages for breach of contracts;
- (vii) Suits for specific reliefs;
- (viii) Suits for restitution of conjugal rights;
- (ix) Suits for dissolution of marriages;
- (x) Suits for rents;
- (xi) Suits for or on accounts;
- (xii) Suits for rights of franchise;
- (xiii) Suits for rights to hereditary offices;
- (xiv) Suits for rights to *Yajmanvritis*;
- (xv) Suits against wrongful dismissals from service and for salaries, etc.

(vi) *Suits not of civil nature: Illustrations.*—The following are not suits of a civil nature:

- (i) Suits involving principally caste questions;
- (ii) Suits involving purely religious rites or ceremonies;
- (iii) Suits for upholding mere dignity or honour;

50 *Ibid.* at pp 118-19 (SCC) at pp 2022-23 (AIR)

51. *Sinha Ramaniya v Ranga Ramaniya*, AIR 1961 SC 1720 at p 1724 (1962) 2 SCR 509

- (iv) Suits for recovery of voluntary payments or offerings;
- (v) Suits against expulsions from caste, etc.

(b) Cognizance not barred

As stated above, a litigant having a grievance of a civil nature has a right to institute a civil suit unless its cognizance is barred, either expressly or impliedly.

(i) *Suits expressly barred.*—A suit is said to be “expressly barred” when it is barred by any enactment for the time being in force.<sup>52</sup> It is open to a competent legislature to bar jurisdiction of civil courts with respect to a particular class of suits of a civil nature, provided that, in doing so, it keeps itself within the field of legislation conferred on it and does not contravene any provision of the Constitution.<sup>53</sup>

But every presumption should be made in favour of the jurisdiction of a civil court and the provision of exclusion of jurisdiction of a court must be strictly construed.<sup>54</sup> If there is any doubt about the ousting of jurisdiction of a civil court, the court will lean to an interpretation which would maintain the jurisdiction.<sup>55</sup> Thus, matters falling within the exclusive jurisdiction of Revenue Courts or under the Code of Criminal Procedure or matters dealt with by special tribunals under the relevant statutes, e.g. by Industrial Tribunal, Election Tribunal, Revenue Tribunal, Rent Tribunal, Cooperative Tribunal, Income Tax Tribunal, Motor Accidents Claims Tribunal, etc., or by domestic tribunals, e.g. Bar Council, Medical Council, University, Club, etc. are expressly barred from the cognizance of a civil court. But if the remedy provided by a statute is not adequate and all questions cannot be decided by a special tribunal, the jurisdiction of a civil court is not barred.<sup>56</sup> Similarly, when

52. *Umrao Singh v Bhagwati Singh*, AIR 1956 SC 15; 1956 SCR 62; *Mohd. Mahmood v. Tikam Das*, AIR 1966 SC 210 at p. 211; (1966) 1 SCR 128, *Gurucharan Singh v Kamla Singh*, (1976) 2 SCC 152; AIR 1977 SC 5 at p. 12; *Bata Shoe Co. Ltd. v. City of Jabalpur Corpn.*, (1977) 2 SCC 472; AIR 1977 SC 955 at p. 963; *Annamreddi Bodayya v. Lokanarapu Ramaswamy*, 1984 Supp SCC 391; AIR 1984 SC 1726; *Sayed Mohd. Baquir v. State of Gujarat*, (1981) 4 SCC 383; AIR 1981 SC 2016, *CIT v. Parmeshwari Devi*, (1998) 3 SCC 481; AIR 1998 SC 1276. For instance, S. 170 of the Representation of the People Act, 1951 reads:

“**Jurisdiction of civil court barred.**—No civil court shall have jurisdiction to question the legality of any action taken or of any decision given by the returning officer or by any other person appointed under this Act in connection with an election.”

53. *State of Vindhya Pradesh v. Moradhwaj Singh*, AIR 1960 SC 796; (1960) 3 SCR 106.

54. *Abdul Waheed Khan v. Bhawani*, AIR 1966 SC 1718 at p. 1719. (1966) 3 SCR 617; *Dhulabhai v. State of M P.*, AIR 1969 SC 78; (1968) 3 SCR 662.

55. *Bharat Kala Bhandar (P) Ltd. v. Municipal Committee, Dhamangaon*, AIR 1966 SC 249 at p. 261. (1965) 3 SCR 499; *Dhulabhai v. State of M P.*, AIR 1969 SC 78.

56. *State of T.N. v. Ramalinga Samigal*, (1985) 4 SCC 10; AIR 1986 SC 794.

a court of limited jurisdiction *prima facie* and incidentally states something, the jurisdiction of a civil court to finally decide the time is not ousted.<sup>57</sup>

(ii) *Suits impliedly barred.*—A suit is said to be impliedly barred when it is barred by general principles of law.

Where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form than that given by the statute.<sup>58</sup> Where an Act creates an obligation and enforces its performance in a specified manner, that performance cannot be enforced in any other manner.<sup>59</sup>

Similarly, certain suits, though of a civil nature, are barred from the cognizance of a civil court on the ground of public policy.<sup>60</sup> "The principle underlying is that a court ought not to countenance matters which are injurious to and against the public weal."<sup>61</sup> Thus, no suit shall lie for recovery of costs incurred in a criminal prosecution or for enforcement of a right upon a contract hit by Section 23 of the Indian Contract Act, 1872; or against any judge for acts done in the course of his duties. Likewise, political questions belong to the domain of public administrative law and are outside the jurisdiction of civil courts. A civil court has no jurisdiction to adjudicate upon disputes of a political nature.

### (3) Who may decide?

It is well-settled that a civil court has inherent power to decide its own jurisdiction.<sup>62</sup>

57. *LIC v. India Automobiles & Co.*, (1990) 4 SCC 286; AIR 1991 SC 884.

58. *Premier Automobiles v. Kamlekar Shantaram*, (1976) 1 SCC 496 at p. 506; AIR 1975 SC 2238 at p. 2245; *Jitendra Nath v. Empire India and Ceylone Tea Co.*, (1989) 3 SCC 582 at pp. 588-89; AIR 1990 SC 255 at p. 260; *Munshi Ram v. Municipal Committee, Chheharla*, (1979) 3 SCC 83; AIR 1979 SC 1250, *Punjab SEB v. Ashwani Kumar*, (1997) 5 SCC 120.

59. *Premier Automobiles*, (1976) 1 SCC 496, at pp. 505-06 (SCC); at p. 2244 (AIR). See also, observations of Lord Tenderden, C.J. in *Deo v. Bridges*, (1831) 1 B&Ad 847 199 ER 1001:

"Where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner."

60. *Ibid.*, see also *Indian Airlines Corpn. v. Sukhdeo Rai*, (1971) 2 SCC 192; AIR 1971 SC 1828, *Sitaram v. Pigment Cakes & Chemicals Mfg. Co.*, (1979) 4 SCC 12; AIR 1980 SC 16, *Mulla Code of Civil Procedure* (1995) Vol. 1 at pp. 75-76.

61. *Per Kapur, J.* in *Union of India v. Ram Chand*, AIR 1955 Punj 166 at p. 169; *Bahoo Gunnessh v. Mugneeram Chowdhry*, (1872) 11 Suth WR 283 (PC).

62. *Bhatia Coop. Housing Society Ltd. v. D.C. Patel*, AIR 1953 SC 16 at p. 19; 1953 SCR 185; *A.R. Antulay v. R.S. Nayak*, (1988) 2 SCC 602 at p. 701; AIR 1988 SC 1531.

#### (4) Presumption as to jurisdiction

In dealing with the question whether a civil court's jurisdiction to entertain a suit is barred or not, it is necessary to bear in mind that every presumption should be made in favour of the jurisdiction of a civil court. The exclusion of jurisdiction of a civil court to entertain civil causes should not be readily inferred unless the relevant statute contains an express provision to that effect, or leads to a necessary and inevitable implication of that nature.<sup>63</sup>

#### (5) Burden of proof

It is well-settled that it is for the party who seeks to oust the jurisdiction of a civil court to establish it. It is equally well-settled that a statute ousting the jurisdiction of a civil court must be strictly construed.<sup>64</sup> Where such a contention is raised, it has to be determined in the light of the words used in the statute, the scheme of the relevant provisions and the object and purpose of the enactment. In the case of a doubt as to jurisdiction, the court should lean towards the assumption of jurisdiction.<sup>65</sup> A civil court has inherent power to decide the question of its own jurisdiction; although as a result of such inquiry it may turn out that it has no jurisdiction to entertain the suit.<sup>66</sup>

#### (6) Objection as to jurisdiction<sup>67</sup>

#### (7) Exclusion of jurisdiction: Limitations

A litigant having a grievance of a civil nature has, independent of any statute, a right to institute a suit in a civil court unless its cognizance is

63. *Firm of Illuri Subbayya Chetty & Sons v. State of A.P.*, AIR 1964 SC 322 at p. 324: (1964) 1 SCR 752. See also *Secy. of State v. Mask & Co.*, (1939-40) 67 IA 222: AIR 1940 PC 105; *Shiromani Gurdwara Parbandhak Committee v. Shiv Rattan*, AIR 1955 SC 576 at p. 581 (1955) 2 SCR 67; *Magiti Sasamal v. Pandab Bissoi*, AIR 1962 SC 547 at pp. 549-50: (1962) 3 SCR 673; *Addanki T.T. Desika v. State of A.P.*, AIR 1964 SC 807, *Kamala Mills Ltd. v. State of Bombay*, AIR 1965 SC 1942 at pp. 1950-51: (1966) 1 SCR 64; *Abdul Waheed Khan v. Bhawani*, AIR 1966 SC 1718 at p. 1719: (1966) 3 SCR 617; *Musamia Imami Haider v. Rabari Govindbhai*, AIR 1969 SC 439 at p. 446 (1969) 1 SCR 785, *Dhulabhai v. State of M.P.*, AIR 1969 SC 78: (1968) 3 SCR 662; *State of W.B. v. Indian Iron & Steel Co. Ltd.*, (1970) 2 SCC 39 at pp. 43-44. AIR 1970 SC 1298 at pp. 1301-02; *Katikara Chintamani Dora v. Guntreddi Annamaniaidu*, (1974) 1 SCC 567 at pp. 578-79: AIR 1974 SC 1069 at pp. 1076-77; *Gurbax Singh v. Financial Commr.*, 1991 Supp (1) SCC 167 at p. 175. AIR 1991 SC 435 at p. 439.

64. *Ibid.*, see also *Abdul Waheed Khan v. Bhawani*, AIR 1966 SC 1718 at p. 1719; *V.L.N S Temple v. Induru Pattabhirami*, AIR 1967 SC 781 at p. 785: (1967) 1 SCR 280, *Mahant Dooj Das v. Udasin Panchayati Bara Akhara*, (2008) 12 SCC 181.

65. *Kamala Mills Ltd. v. State of Bombay*, AIR 1965 SC 1942 at p. 1951: (1966) 1 SCR 64; *Katikara Chintamani Dora v. Guntreddi Annamaniaidu*, (1974) 1 SCC 567.

66. *Bhatia Coop. Housing Society Ltd. v. D.C. Patel*, AIR 1953 SC 16 at p. 19. 1953 SCR 185

67. For detailed discussion, see *infra*, Chap. 4.

either expressly or impliedly barred. The exclusion of the jurisdiction of a civil court is not to be readily inferred and such exclusion must be clear.<sup>68</sup>

Again, even when the jurisdiction of a civil court is barred, either expressly or by necessary implication, it cannot be said that the jurisdiction is altogether excluded. A court has jurisdiction to examine whether the provisions of the Act and the Rules made thereunder have or have not been complied with, or the order is contrary to law, *mala fide*, *ultra vires*, perverse, arbitrary, "purported", violative of the principles of natural justice, or is based on "no evidence" and so on. In all these cases, the order cannot be said to be *under the Act* but is *de hors* the Act and the jurisdiction of a civil court is not ousted.<sup>69</sup>

In the leading decision of *Secy. of State v. Mask & Co.*<sup>70</sup>, the Privy Council rightly observed:

"It is settled law that the exclusion of the jurisdiction of the civil courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well established that even if jurisdiction is so excluded, the civil courts, have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."<sup>71</sup>

It is respectfully submitted that the following observations of Subba Rao, J. (as he then was) in the leading case of *Firm Seth Radha Kishan v. Administrator, Municipal Committee, Ludhiana*<sup>72</sup> lay down the correct

68. *Dhulabhai v. State of M.P.*, AIR 1969 SC 78: (1968) 3 SCR 662. For detailed discussion, see *infra*, "Exclusion of jurisdiction of civil court: Principles".

69. *Secy. of State v. Mask & Co.*, (1939-40) 67 IA 222: AIR 1940 PC 105, *Anisminic Ltd v Foreign Compensation Commission*, 1969) 2 AC 147: (1969) 2 WLR 163 : (1969) 1 All ER 208 (HL); *Dharangadhra Chemical Works Ltd. v. State of Saurashtra*, AIR 1957 SC 264: 1957 SCR 152; *Firm Seth Radha Kishan v. Municipal Committee, Ludhiana*, AIR 1963 SC 1547; *Firm of Illuri Subbayya Chetty & Sons*, AIR 1964 SC 322 (1964) 1 SCR 752; *Bharat Kala Bhandar (P) Ltd v. Municipal Committee, Dhamangaon*, AIR 1966 SC 249 at p. 261: (1965) 3 SCR 499; *Dhulabhai v. State of M.P.*, AIR 1969 SC 78: (1968) 3 SCR 662; *Srinivasa v. State of A P.*, (1969) 3 SCC 711: AIR 1971 SC 71, *Union of India v Tarachand Gupta and Bros.*, (1971) 1 SCC 486: AIR 1971 SC 1558, *Premier Automobiles v. Kamlekar Shantaram*, (1976) 1 SCC 496. AIR 1975 SC 2238; *Bata Shoe Co Ltd v Citu of Jabalpur Corpn*, (1977) 2 SCC 472 AIR 1977 SC 955, *Sayed Mohd Baquir v State of Gujarat*, (1981) 4 SCC 383: AIR 1981 SC 2016; *State of T N v. Ramalinga Samigal*, (1985) 4 SCC 10: AIR 1985 SC 19; *CST v Auraiya Chamber of Commerce*, (1986) 3 SCC 50. AIR 1986 SC 1556; *Jitendra Nath v Empire India and Ceylone Tea Co.*, (1989) 3 SCC 582 at pp. 88-89: 1989 SCC (L&S) 552; *Gurbax Singh v. Financial Commr.*, 1991 Supp (1) SCC 167 AIR 1991 SC 435; *Shiv Kumar v MCD*, (1993) 3 SCC 161, *Krishan Lal v State of J&K*, (1994) 4 SCC 422: (1994) 27 ATC 590

70. (1939-40) 67 IA 222 AIR 1940 PC 105

71. *Ibid.* at p. 110 (AIR) (per Lord Thankerton); see also *Tarachand Gupta case*, (1971) 1 SCC 486, *Sayed Mohd Baquir case*, (1981) 4 SCC 383, *Ramalinga case*, (1985) 4 SCC 10

72. AIR 1963 SC 1547 (1964) 2 SCR 273.

legal position regarding jurisdiction of civil courts and require to be reproduced:

"Under Section 9 of the Code of Civil Procedure the court shall have jurisdiction to try all suits of civil nature excepting suits of which cognizance is either expressly or impliedly barred. A statute, therefore, expressly or by necessary implication, can bar the jurisdiction of civil courts in respect of a particular matter. The mere conferment of special jurisdiction on a tribunal in respect of the said matter does not in itself exclude the jurisdiction of civil courts. The statute may specifically provide for ousting the jurisdiction of civil courts; even if there was no such specific exclusion, if it creates a liability not existing before and gives a special and particular remedy for the aggrieved party, the remedy provided by it must be followed. The same principle would apply if the statute had provided for the particular forum in which the remedy could be had. Even in such cases, the civil court's jurisdiction is not completely ousted. *A suit in a civil court will always lie to question the order of a tribunal created by a statute, even if its order is, expressly or by necessary implication, made final, if the said tribunal abuses its power or does not act under the Act but in violation of its provisions.*"<sup>73</sup>  
(emphasis supplied)

### (8) Exclusion of jurisdiction of civil court: Principles

From the above discussion, it is clear that the jurisdiction of civil courts is all-embracing except to the extent it is excluded by law or by clear intendment arising from such law.

In the classic decision of *Dhulabhai v. State of M.P.*<sup>74</sup>, after considering a number of cases, Hidayatullah, C.J. summarised the following principles relating to the exclusion of jurisdiction of civil courts:

- (a) Where a statute gives finality to orders of special tribunals, the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such a provision, however, does not exclude those cases where the provisions of a particular Act have not been complied with or the statutory tribunal has not acted in conformity with fundamental principles of judicial procedure.
- (b) Where there is an express bar of jurisdiction of a court, an examination of the scheme of a particular Act to find the adequacy or sufficiency of the remedies provided may be relevant but this is not decisive for sustaining the jurisdiction of a civil court.

Where there is no express exclusion, the examination of the remedies and the scheme of a particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In

73. *Ibid*, at p. 1551 (AIR). See also, observations of Shelat, J. in *Tarachand Gupta case*, (1971) 1 SCC 486 and of Lord Reid in *Anisminic Ltd case*, (1969) 2 WLR 163. (1969) 1 All ER 208 (HL); Authors' *Lectures on Administrative Law* (2012) Lecture 7; Authors' *Administrative Law* (2012) Chap. 8.

74. AIR 1969 SC 78. (1968) 3 SCR 662.

the latter case, it is necessary to see if a statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

- (c) Challenge to the provisions of a particular Act as *ultra vires* cannot be brought before tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from decisions of tribunals.
- (d) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.
- (e) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or is illegally collected, a suit lies.
- (f) Questions of the correctness of an assessment, apart from its constitutionality, are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in a particular Act. In either case, the scheme of a particular Act must be examined because it is a relevant enquiry.
- (g) An exclusion of jurisdiction of a civil court is not readily to be inferred unless the conditions above set down apply.<sup>75</sup>

The above principles enunciated are relevant in deciding the correctness or otherwise of assessment orders made under taxing statutes.<sup>76</sup>

In *Premier Automobiles v. Kamlekar Shantaram*<sup>77</sup>, the Supreme Court laid down the following principles as applicable to the jurisdiction of a civil court in relation to industrial disputes:

- (h) If a dispute is not an industrial dispute, nor does it relate to enforcement of any other right under the Act, the remedy lies only in a civil court.
- (i) If a dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the Act, the jurisdiction of a civil court is alternative, leaving it to the election of a suitor or person concerned to choose his remedy for the relief which is competent to be granted in a particular remedy.
- (j) If an industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to a suitor is to get an adjudication under the Act

75 *Ibid* at pp 89-90 (AIR) at pp 682-84 (SCR) For detailed discussion, see Authors' *Lectures on Administrative Law* (2012) Lecture 7, Authors' *Administrative Law* (2012) Chap 8

76 For jurisdiction of civil court in connection with levy of octroi duty see *Bata Shoe Co Ltd v City of Jabalpur Corpn* (1977) 2 SCC 472 AIR 1977 SC 955

77 (1976) 1 SCC 496 AIR 1975 SC 2238

- (k) If the right which is sought to be enforced is a right created under the Act such as Chap. V-A then the remedy for its enforcement is either Section 33-C or the raising of an industrial dispute, as the case may be.<sup>78</sup>

Again, in *Rajasthan SRTC v. Krishna Kant*<sup>79</sup>, after considering various leading decisions on the point, the Supreme Court summarised the principles applicable to industrial disputes thus:

- (1) Where a dispute arises from the general law of contract, i.e., where reliefs are claimed on the basis of the general law of contract, a suit filed in a civil court cannot be said to be not maintainable, even though such a dispute may also constitute an "industrial dispute" within the meaning of Section 2(k) or Section 2-A of the Industrial Disputes Act, 1947.
- (2) Where, however, a dispute involves recognition, observance or enforcement of any of the rights or obligations created by the Industrial Disputes Act, the only remedy is to approach the forums created by the said Act.
- (3) Similarly, where a dispute involves the recognition, observance or enforcement of rights and obligations created by enactments, like the Industrial Employment (Standing Orders) Act, 1946, which can be called "sister enactments" to the Industrial Disputes Act, and which do not provide a forum for resolution of such disputes, the only remedy shall be to approach the forums created by the Industrial Disputes Act provided they constitute industrial disputes within the meaning of Section 2(k) and Section 2-A of the Industrial Disputes Act or where such enactment says that such dispute shall be either treated as an industrial dispute or says that it shall be adjudicated by any of the forums created by the Industrial Disputes Act. Otherwise, recourse to a civil court is open.
- (4) It is not correct to say that remedies provided by the Industrial Disputes Act are not equally effective for the reason that access to a forum depends upon a reference being made by the appropriate Government. The power to make a reference conferred upon the Government is to be exercised to effectuate the object of the enactment and hence is not unguided. The rule is to make a reference unless, of course, the dispute raised is a totally frivolous one *ex facie*. The power conferred is the power to refer and not the power to decide, though it may be that the Government is entitled to examine whether the dispute is *ex facie* frivolous, not meriting adjudication.
- (5) Consistent with the policy of law aforesaid, we commend to Parliament and State Legislatures to make a provision enabling a workman to approach the Labour Court/Industrial Tribunal directly i.e., without the requirement of a reference by the Government, in case of industrial disputes covered by Section 2-A of the Industrial Disputes Act. This

78. *Premier Automobiles v. Kamlekar Shantaram*, (1976) 1 SCC 496 at pp 513-14. AIR 1975 SC 2238 at p. 2251.

79. (1995) 5 SCC 75; AIR 1995 SC 1715 (1995) 31 ATC 110.

would go a long way in removing the misgivings with respect to the effectiveness of the remedies provided by the Industrial Disputes Act.

- (6) The certified Standing Orders framed in accordance with the Industrial Employment (Standing Orders) Act, 1946 are statutorily imposed conditions of service and are binding both upon employers and employees, though they do not amount to "statutory provisions". Any violation of these Standing Orders entitles an employee to appropriate relief, either before forums created by the Industrial Disputes Act or in a civil court where recourse to a civil court is open according to the principles indicated herein.
- (7) The policy of law emerging from the Industrial Disputes Act and its sister enactments is to provide an alternative dispute-resolution mechanism to workmen, a mechanism which is speedy, inexpensive, informal and unencumbered by the plethora of procedural laws and appeals upon appeals and revisions applicable to civil courts. Indeed, the powers of courts and tribunals under the Industrial Disputes Act are far more extensive in the sense that they can grant such relief as they think appropriate in the circumstances for putting an end to an industrial dispute.<sup>80</sup>

In *Chandrakant v. Municipal Corpn. of Ahmedabad*<sup>81</sup>, the Supreme Court reiterated the principles laid down in earlier decisions and stated:

"It cannot be disputed that the procedure followed by civil courts are too lengthy and consequently, are not an efficacious forum for resolving the industrial disputes speedily. *The power of the Industrial Courts also is wide and such forums are empowered to grant adequate relief as they think just and appropriate. It is in the interest of the workmen that their disputes, including the dispute of illegal termination, are adjudicated upon by an industrial forum.*"<sup>82</sup>

(emphasis supplied)

## 12. GENERAL PRINCIPLES

From various decisions of the Supreme Court, the following general principles relating to jurisdiction of a civil court emerge:

- (1) A civil court has jurisdiction to try all suits of a civil nature unless their cognizance is barred either expressly or impliedly
- (2) Consent can neither confer nor take away jurisdiction of a court
- (3) A decree passed by a court without jurisdiction is a nullity and the validity thereof can be challenged at any stage of the proceedings, in execution proceedings or even in collateral proceedings

80. *Ibid* at pp 94-95 (SCC) at pp 1725-26 (AIR) (per Jeevan Reddy, J.).

81. (2002) 2 SCC 542

82. *Ibid* at p 550 (SCC) (per Pattanaiak, J.) see also *Church of North India v. Lavanibhai Ratanibhai* (2005) 10 SCC 760 AIR 2005 SC 2544 *State of Haryana v. Bikaner Singh* (2006) 9 SCC 450 AIR 2006 SC 2473 *Ranasthan SRTC v. Zakir Hussain* (2005) 7 SCC 447 *Chief Engineer, Hydel Project v. Ravinder Nath*, (2008) 2 SCC 350

- (4) There is a distinction between want of jurisdiction and irregular exercise thereof.
- (5) Every court has inherent power to decide the question of its own jurisdiction.
- (6) Jurisdiction of a court depends upon the averments made in a plaint and not upon the defence in a written statement.
- (7) For deciding jurisdiction of a court, the substance of a matter and not its form is important.
- (8) Every presumption should be made in favour of jurisdiction of a civil court.
- (9) A statute ousting jurisdiction of a court must be strictly construed.
- (10) Burden of proof of exclusion of jurisdiction of a court is on the party who asserts it.
- (11) Even where jurisdiction of a civil court is barred, it can still decide whether the provisions of an Act have been complied with or whether an order was passed dehors the provisions of law.

## CHAPTER 2

# Res Sub Judice and Res Judicata

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## 1. GENERAL

In this Chapter, we intend to discuss two important doctrines: (i) Doctrine of *res sub judice*, Section 10; and (ii) Doctrine of *res judicata*, Section 11.

Section 10 deals with stay of civil suits. It provides that no court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties and that the court in which the previous suit is pending is competent to grant the relief claimed.

Section 11, on the other hand, relates to a matter already adjudicated upon. It bars the trial of a suit or an issue in which the matter directly and substantially in issue has already been adjudicated upon in a previous suit.

## 2. RES SUB JUDICE: STAY OF SUIT: SECTION 10

### (1) Section 10

Section 10 reads thus:

"No court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court in India having jurisdiction to grant the relief claimed, or in any court beyond the limits of India established or constituted by the Central Government and having like jurisdiction, or before the Supreme Court."

*Explanation.*—The pendency of a suit in foreign court does not preclude the courts in India from trying a suit founded on the same cause of action.

### (2) Nature and scope

Section 10 declares that no court should proceed with the trial of any suit in which the matter in issue is directly and substantially in issue in a previously instituted suit between the same parties and the court before which the previously instituted suit is pending is competent to grant the relief sought.<sup>1</sup>

The rule applies to trial of a suit and not the institution thereof. It also does not preclude a court from passing interim orders, such as, grant of injunction or stay, appointment of receiver,<sup>2</sup> etc. It, however, applies to appeals<sup>3</sup> and revisions.<sup>4</sup>

### (3) Object

The object of the rule contained in Section 10 is to prevent courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject-matter and the same relief. The policy of law is to confine a plaintiff to one litigation, thus obviating the possibility of two contradictory verdicts by one and the same court in respect of the same relief.<sup>5</sup>

1. *Indian Bank v Maharashtra State Coop Marketing Federation Ltd*, (1998) 5 SCC 69 AIR 1998 SC 1952, *Maharashtra State Coop Marketing Federation Ltd v Indian Bank*, AIR 1997 Bom 186

2. *Indian Bank v Maharashtra State Coop Marketing Federation*, (1998) 5 SCC 69

3. *Raj Spinning Mills v. A G King Ltd*, AIR 1954 Punj 113, *State of Rajasthan v Dewan Suraj Prakash*, AIR 1973 Raj 119, *Durga Dass v Gitan Devi*, AIR 1977 HP 65

4. *Vaithilinga Pandara Sannadhi Re* AIR 1930 Mad 381 II R (1930) 53 Mad 262 (FB)

5. *Balkishan v Kishan Lal*, ILR (1889) 11 All 148 (FB); *Guru Prasad (Dr) v Bhoov Kumar Das* AIR 1954 Ori 209 at p. 212, *PV Shetty v B S Chaudhar* (1982) 3 SCC 403 AIR 1982 SC 83, *Gupte Cardiac Care Centre and Hospital v Olympic Pharma Care (P) Ltd* (2004)

The section intends to protect a person from multiplicity of proceedings and to avoid a conflict of decisions. It also aims to avert inconvenience to the parties and gives effect to the rule of *res judicata*.<sup>6</sup>

It is to be remembered that the section does not bar the institution of a suit, but only bars a trial, if certain conditions are fulfilled. The subsequent suit, therefore, cannot be dismissed by a court, but is required to be stayed.

#### (4) Conditions

For the application of this section, the following conditions must be satisfied:

- (i) There must be two suits, one previously instituted and the other subsequently instituted.
- (ii) The matter in issue in the subsequent suit must be directly and substantially in issue in the previous suit.
- (iii) Both the suits must be between the same parties or their representatives.
- (iv) The previously instituted suit must be pending in the same court in which the subsequent suit is brought or in any other court in India or in any court beyond the limits of India established or continued by the Central Government or before the Supreme Court.
- (v) The court in which the previous suit is instituted must have jurisdiction to grant the relief claimed in the subsequent suit.
- (vi) Such parties must be litigating under the same title in both the suits.

As soon as the above conditions are satisfied, a court cannot proceed with the subsequently instituted suit since the provisions contained in Section 10 are mandatory,<sup>7</sup> and no discretion is left with the court. The order staying proceedings in the subsequent suit can be made at any stage.<sup>8</sup>

Section 10, however, does not take away power of the court to examine the merits of the matter. If the court is satisfied that subsequent suit can be decided purely on legal point, it is open to the court to decide such suit.<sup>9</sup>

6 SCC 756. AIR 2004 SC 2339; *National Institute of Medical Health & Neuro Sciences v. C Parameshwara*, (2005) 2 SCC 256. AIR 2005 SC 242.

6. *S P A. Annamalai Chetty v. B.A. Thornhill*, AIR 1931 PC 263, *Shri Ram Tiwary v. Bholi Devi*, AIR 1994 Pat 76.

7. *Manohar Lal Chopra v. Seth Hiralal*, AIR 1962 SC 527 1962 Supp (1) SCR 450.

8. *Life Pharmaceuticals (P) Ltd v Bengal Medical Hall*, AIR 1971 Cal 345

9. *Pukhraj D. Jain v. G. Gopalakrishna*, (2004) 7 SCC 251. AIR 2004 SC 3504.

### (5) Test

The test for applicability of Section 10 is whether the decision in a previously instituted suit would operate as *res judicata* in the subsequent suit. If it is so, the subsequent suit must be stayed.<sup>10</sup>

### (6) Res sub judice and res judicata<sup>11</sup>

### (7) Suit pending in foreign court: Explanation

Explanation to Section 10 provides that there is no bar on the power of an Indian court to try a subsequently instituted suit if the previously instituted suit is pending in a foreign court.

### (8) Inherent power to stay

Even where the provisions of Section 10 of the Code do not strictly apply, a civil court has inherent power under Section 151 to stay a suit to achieve the ends of justice.<sup>12</sup> Similarly, a court has inherent power to consolidate different suits between the same parties in which the matter in issue is substantially the same.<sup>13</sup>

### (9) Consolidation of suits

Since the main purpose of Section 10 is to avoid two conflicting decisions, a court in an appropriate case can pass an order of consolidation of both the suits.<sup>14</sup>

### (10) Contravention: Effect

A decree passed in contravention of Section 10 is not a nullity, and therefore, cannot be disregarded in execution proceedings.<sup>15</sup> Again, as

10. *S.P.A. Annamalai Chetty v. B A. Thornhill*, AIR 1931 PC 263, (1931) 61 MLJ 420, 36 CWN 1; *Radha Devi v. Deep Narayan*, (2003) 11 SCC 759, *National Institute of Medical Health & Neuro Sciences v. C. Parameshwara*, (2005) 2 SCC 256.

11. See *infra*, "Res judicata"

12. *Jado Rai v. Onkar Prasad*, AIR 1975 All 413, *P.V. Shetty v. B S. Giridhar* (1982) 3 SCC 403, AIR 1982 SC 83.

13. *P.P. Gupta v. East Asiatic Co.*, AIR 1960 All 184; *Bokaro & Ramgur Ltd. v. State of Bihar*, AIR 1973 Pat 340; *Guru Prasad Mohanty (Dr.) v. Bhoj Kumar Das*, AIR 1984 Ori 209.

14. *Indian Bank v. Maharashtra State Coop. Marketing Federation Ltd.*, (1998) 5 SCC 69, AIR 1998 SC 1952; *Prem Lala Nahata v. Chand Prasad Sikaria*, (2007) 2 SCC 551, AIR 2007 SC 1247.

15. *Pukhraj D. Jain v. G. Gopalakrishna*, (2004) 7 SCC 251; *Sheopat Rai v. Warak Chand*, AIR 1919 Lah 294, *Indian Express Newspapers (Bombay) Ltd. v. Basumati (P) Ltd.*, AIR 1969 Bom 40, *Naurati v. Menma Singh*, AIR 1972 Punj 421; *Life Pharmaceuticals (P) Ltd. v. Bengal Medical Hall*, AIR 1971 Cal 345.

stated above, it is only the trial and not the institution of the subsequent suit which is barred under this section. Thus, it lays down a rule of procedure, pure and simple, which can be waived by a party. Hence, if the parties waive their right and expressly ask the court to proceed with the subsequent suit, they cannot afterwards challenge the validity of the subsequent proceedings.<sup>16</sup>

### (11) Interim orders

An order of stay of suit does not take away the power of the court from passing interim orders. Hence, in a stayed suit, it is open to the court to make interim orders, such as, attachment before judgment, temporary injunction, appointment of receiver, amendment of plaint or written statement, etc.<sup>17</sup>

## 3. RES JUDICATA: SECTION 11

### (1) General

Section 11 of the Code of Civil Procedure embodies the doctrine of *res judicata* or the rule of conclusiveness of a judgment, as to the points decided either of fact, or of law, or of fact and law, in every subsequent suit between the same parties. It enacts that once a matter is finally decided by a competent court, no party can be permitted to reopen it in a subsequent litigation. In the absence of such a rule there will be no end to litigation and the parties would be put to constant trouble, harassment and expenses.<sup>18</sup>

This doctrine has been accepted in all civilized legal systems. Under the Roman Law, a defendant could successfully contest a suit filed by a plaintiff on the plea of "*ex captio res judicata*". It was said, "one suit and one decision is enough for any single dispute". In the words of Spencer Bower, *res judicata* means "a final judicial decision pronounced by a judicial tribunal having competent jurisdiction over the cause or matter in litigation, and over the parties thereto".

16. *Gangaprashad v. Banaspati*, AIR 1937 Nag 132; *Munilal v. Sarvajeet*, AIR 1984 Raj 22.

17. *Indian Bank v. Maharashtra State Coop. Mktg. Federation Ltd.*, (1998) 5 SCC 69 (72): AIR 1998 SC 1952 (1954).

18. *Satyadhyan Ghosal v. Deorjun Debi*, AIR 1960 SC 941: (1960) 3 SCR 590; *Daryao v. State of U.P.*, AIR 1961 SC 1457: (1962) 1 SCR 574, *Pandurang Ramchandra v. Shantibai Ramchandra*, 1989 Supp (2) SCC 627: AIR 1989 SC 2240; *Supreme Court Employees' Welfare Assn. v. Union of India*, (1989) 4 SCC 187: AIR 1990 SC 334, *LIC v. India Automobiles & Co.*, (1990) 4 SCC 286: AIR 1991 SC 884, *Sushil Kumar v. Gobind Ram*, (1990) 1 SCC 193; *Sulochana Amma v. Narayanan Nair*, (1994) 2 SCC 14. AIR 1994 SC 152; *Gangai Vinayagar Temple v. Meenakshi Ammal*, (2009) 9 SCC 757

The doctrine of *res judicata* has been explained in the simplest possible manner by Das Gupta, J. in the case of *Satyadhyan Ghosal v. Deorjin Debi*<sup>19</sup> in the following words:

"The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a *res* is *judicata*, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter, whether on a question of fact or a question of law, has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again."<sup>20</sup>

## (2) Section 11

Section 11 of the Code of Civil Procedure reads thus:

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

*Explanation I.*—The expression 'former suit' shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

*Explanation II.*—For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

*Explanation III.*—The matter abovereferred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

*Explanation IV.*—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

*Explanation V.*—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

*Explanation VI.*—Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

*Explanation VII.* The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively to

19 AIR 1960 SC 941 (1960) 3 SCR 590

20 *Ibid.* at p. 943 (AIR)

a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

*Explanation VIII.*—An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as *res judicata* in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit in which such issue has been subsequently raised."

### (3) Nature and scope

The doctrine of *res judicata* is conceived in the larger public interest which requires that all litigation must, sooner than latter, come to an end.<sup>21</sup> The principle is also founded on justice, equity and good conscience which require that a party who has once succeeded on an issue should not be harassed by multiplicity of proceedings involving the same issue.<sup>22</sup> Section 11 of the Code contains in statutory form, with illuminating explanations very salutary principle of public policy.<sup>23</sup> It embodies the rule of conclusiveness and operates as a bar to try the same issue once again. It thereby avoids vexatious litigation.<sup>24</sup>

### (4) Object

The doctrine of *res judicata* is based on three maxims:

- (a) *nemo debet bis vexari pro una et eadem causa* (no man should be vexed twice for the same cause);
- (b) *interest reipublicae ut sit finis litium* (it is in the interest of the State that there should be an end to a litigation); and
- (c) *res judicata pro veritate occipitur* (a judicial decision must be accepted as correct).

As observed by Sir Lawrence Jenkins<sup>25</sup>, "the rule of *res judicata*, while founded on account of precedent, is dictated by a wisdom which is for all times".

Thus, the doctrine of *res judicata* is the combined result of public policy reflected in maxims (b) and (c) and private justice expressed in maxim (a); and they apply to all judicial proceedings whether civil or criminal. But for this rule there would be no end to litigation and no security for any person, the rights of persons would be involved in

21. *Lal Chand v. Radha Krishan*, (1977) 2 SCC 88: AIR 1977 SC 789.

22. *Ibid*, see also *infra*, "Object".

23. *Narayan Prabhu Venkateswara v. Narayana Prabhu Krishna*, (1977) 2 SCC 181: AIR 1977 SC 1268.

24. *Sulochana Amma v. Narayanan Nair*, (1994) 2 SCC 14: AIR 1994 SC 152; *Workmen v. Board of Trustees, Cochin Port Trust*, (1978) 3 SCC 119.

25. *Sheoparsan Singh v. Ramnandan Singh*, (1915-16) 43 IA 91: AIR 1916 PC 78.

endless confusion and great injustice done under the cover of law.<sup>26</sup> The principle is founded on justice, equity and good conscience.<sup>27</sup>

The leading case on the doctrine of *res judicata* is the *Duchess of Kingstone case*<sup>28</sup>, wherein Sir William de Grey made the following remarkable observations:

"From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true; *firstly*, that judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence conclusive, between the same parties, upon the same matter, directly in question in another court; *secondly*, that the judgment of a court of exclusive jurisdiction, directly on the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose."<sup>29</sup>

In *Corpus Juris*<sup>30</sup> also it has been stated, "*Res judicata* is a rule of universal law pervading every well-regulated system of jurisprudence and is put upon two grounds, embodied in various maxims of the common law; the one, public policy and necessity, which makes it to the interest of the State that there should be an end to litigation; the other, the hardship to the individual that he should not be vexed twice for the same cause."<sup>31</sup>

## (5) Illustrations

Let us consider few illustrations to understand the doctrine of *res judicata*:

- (1) A sues B for damages for breach of contract. The suit is dismissed. A subsequent suit by A against B for damages for breach of the same contract is barred. A's right to claim damages from B for

26. *Daryao v. State of U P*, AIR 1961 SC 1457 at pp 1462 (1962) 1 SCR 574, *Satyadhyam Ghosal v. Deorjin Debi*, AIR 1960 SC 941. (1960) 3 SCR 590; *Parashuram Pottery Works Co. Ltd. v. ITO*, (1977) 1 SCC 408 AIR 1977 SC 429; *Radhasoami Satsang v. CIT*, (1992) 1 SCC 659. AIR 1992 SC 377, *Sulochana Amma v. Narayanan Nair*, (1994) 2 SCC 119, *Swamy Atmananda v. Sri Ramakrishna Tapovanam*, (2005) 10 SCC 51 AIR 2005 SC 2392, *Kunjan Nair v. Narayanan Nair*, (2004) 3 SCC 277. AIR 2004 SC 1761. *State of Haryana v. State of Punjab*, (2004) 12 SCC 673; *Gangai Vinayagar Temple v. Meenakshi Ammal*, (2009) 9 SCC 757.

27. *Lal Chand v. Radha Krishan*, (1977) 2 SCC 88 at p. 98. AIR 1977 SC 789 at pp 796

28. *Smith's Leading cases* (13th Edn) at p 644

29. *Smith's Leading cases* (13th Edn) at p 645 See also *Daryao v. State of U P*, AIR 1961 SC 1457 at pp 1462 (1962) 1 SCR 574, *Gulam Abbas v. State of U P.*, (1982) 1 SCC 71 at pp 90-93 AIR 1981 SC 2198 at pp. 2212-13.

30. Vol 34 at p 743

31. See also *Halsbury's Laws of England* (3rd Edn) Vol 15 at p 185 *Daryao v. State of U P*, AIR 1961 SC 1457 at p 1462 (1962) 1 SCR 574, *Gulam Abbas v. State of U P.*, (1982) 1 SCC 71 AIR 1981 SC 2198

breach of contract having been decided in the previous suit, it becomes *res judicata*, and cannot therefore be tried in the subsequent suit. *B* cannot be vexed twice over for the same cause (breach of contract). Moreover, public policy also requires that there should be an end to a litigation and for that reason, the previous decision must be accepted as correct, lest every decision would be challenged on the ground that it was an erroneous decision and there would be no finality.

- (2) *A* sues *B* for possession of certain properties on the basis of a sale deed in his favour. *B* impugns the deed as fictitious. The plea is upheld and the suit is dismissed. A subsequent suit for some other properties on the basis of the same sale deed is barred as the issue about the fictitious nature of the sale deed was actually in issue in the former suit directly and substantially.
- (3) *A* sues *B*, *C* and *D* and in order to decide the claim of *A*, the court has to interpret a will. The decision regarding the construction of the will on rival claims of the defendants will operate as *res judicata* in any subsequent suit by any of the defendants against the rest.
- (4) *A* files a petition in a High Court under Article 226 of the Constitution for reinstatement in service and consequential benefits contending that an order of dismissal passed against him is illegal. The petition is dismissed. *A* cannot thereafter file a fresh petition in the Supreme Court under Article 32 of the Constitution nor can institute a suit in a civil court as such petition or suit would be barred by *res judicata*.
- (5) *A* sues *B* for possession of certain property alleging that it has come to his share on partition of joint family property. *B*'s contention that the partition has not taken place is upheld by the court and the suit is dismissed. A subsequent suit by *A* against *B* for partition of joint family property is not barred.
- (6) *A*, claiming himself to be the owner of the property files a suit for eviction of tenant *B* and sub-tenant *C* which is decreed *ex parte* by a Small Cause Court. *C* then files a suit in the civil court on the basis of title. *A* pleaded *res judicata* in the light of the decree passed in the former suit. The finding regarding ownership of *A* will not operate as *res judicata* inasmuch as title to the property was not directly and substantially in issue in the former suit.
- (7) *A*, a partnership firm, filed a suit against *B* to recover Rs 50,000. The suit was dismissed on the ground that it was not maintainable since the partnership was not registered as required by the provisions of the Indian Partnership Act, 1932. The firm was thereafter registered and a fresh suit was filed against *B* on the same cause of action. The suit is not barred by *res judicata*.

- (8) A files a petition in a High Court under Article 226 of the Constitution for reinstatement in service and consequential benefits contending that an order of dismissal passed against him is illegal. The petition is dismissed on the ground that disputed questions of fact are involved in the petition and alternative remedy is available to the petitioner. A suit in a competent civil court after dismissal of the petition is not barred by *res judicata*.

## (6) History

The rule of *res judicata* has a very ancient history. It was well understood by Hindu lawyers and Mohammedan jurists. It was known to ancient Hindu Law as *Purva Nyaya* (former judgment). Under the Roman Law, it was recognised that "one suit and one decision was enough for any single dispute". The doctrine was accepted in the European continent and in the Commonwealth countries.<sup>32</sup>

At times, the rule worked harshly on individuals. For instance, when the former decision was obviously erroneous. But its working was justified on the great principle of public policy, which required that there must be an end to every litigation. The basis of the doctrine of *res judicata* is public interest and not absolute justice. In the event of a wrong decision, "the suffering citizen must appeal to the law-giver and not to the lawyer".<sup>33</sup>

## (7) Extent and applicability

The doctrine of *res judicata* is a fundamental concept based on public policy and private interest. It is conceived in the larger public interest which requires that every litigation must come to an end. It, therefore, applies to civil suits, execution proceedings, arbitration proceedings, taxation matters, industrial adjudication, writ petitions, administrative orders, interim orders, criminal proceedings, etc.<sup>34</sup>

## (8) Res judicata and rule of law

The doctrine of *res judicata* is of universal application. In the historic decision of *Daryao v. State of U.P.*<sup>35</sup>, the Supreme Court has placed the doctrine of *res judicata* on a still broader foundation. In that case, the petitioners had filed writ petitions in the High Court of Allahabad under

32 *Lachhmi v Bhullu*, AIR 1927 Lah 289 II R (1927) 8 Lah 184; 104 IC 849 (FB). *Soorjomonee Dayee v. Suddanund Mohapatter*, (1873) 1A Supp 212 at p 218 (PC)

33 *Garland v Carlisle*, 4 Cl&F 693 at p 705 (HL) (per Coleridge J), see also *Sheoparsan Singh v Ramnandan Singh*, (1915-16) 43 IA 91 AIR 1916 PC 78

34 For detailed discussion and case law, see, Authors' *Code of Civil Procedure* (Lawyers' Edn) Vol I at pp 112-109

35 AIR 1961 SC 1457 (1962) 1 SCR 574

Article 226 of the Constitution and they were dismissed. Thereafter, they filed substantive petitions in the Supreme Court under Article 32 of the Constitution for the same relief and on the same grounds. The respondents raised a preliminary objection regarding maintainability of the petition by contending that the prior decision of the High Court would operate as *res judicata* to a petition under Article 32. The Supreme Court upheld the contention and dismissed the petitions.

Speaking for the Constitution Bench, Gajendragadkar, J. (as he then was) observed:

*"The binding character of judgments pronounced by courts of competent jurisdiction is itself an essential part of the rule of law, and the rule of law obviously is the basis of the administration of justice on which the Constitution lays so much emphasis."*<sup>36</sup> (emphasis supplied)

The court, in this view of the matter, held that the rule of *res judicata* applies also to a petition filed under Article 32 of the Constitution and if a petition filed by a petitioner in the High Court under Article 226 of the Constitution is dismissed on merits, such decision would operate as *res judicata* so as to bar a similar petition in the Supreme Court under Article 32 of the Constitution.

### (9) *Res judicata* and *res sub judice*<sup>37</sup>

The doctrine of *res judicata* differs from *res sub judice* in two aspects:

- (i) whereas *res judicata* applies to a matter adjudicated upon (*res judicatum*), *res sub judice* applies to a matter pending trial (*sub judice*); and
- (ii) *res judicata* bars the trial of a suit or an issue which has been decided in a former suit, *res sub judice* bars trial of a suit which is pending decision in a previously instituted suit.

### (10) *Res judicata* and *lis pendens*<sup>38</sup>

The doctrine of *lis pendens* is only one aspect of the rule of *res judicata*. Whereas the principle of *lis pendens* laid down in Section 52 of the

36. *Ibid*, at p. 1462 (AIR); see also *Sarguja Transport Service v. STAT*, (1987) 1 SCC 5. AIR 1987 SC 88; *Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra*, (1990) 2 SCC 715 at p. 741. AIR 1990 SC 1607.

37. For detailed discussion of "*res sub judice*" see *supra*, under that head.

38. S. 52 of the Transfer of Property Act, 1882 which enacts the doctrine of *lis pendens* reads:

"52. **Transfer of property pending suit relating thereto.**—During the pendency in any court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or

Transfer of Property Act, 1882 is that an alienee *pendente lite* is bound by the outcome of the litigation, the rule in Section 11 of the Code relates to matters which have passed into *rem judicatam*. Where a conflict arises between the doctrine of *res judicata* and *lis pendens*, the former will prevail over the latter. In other words, once a judgment is duly pronounced by a competent court in regard to the subject-matter of the suit in which the doctrine of *lis pendens* applies, the said decision would operate as *res judicata* and would bind not only the parties thereto but also the transferees *pendente lite*.

Let us understand this principle by an illustration. A files a suit against B for declaration that he is the owner of the suit property. During the pendency of the suit B transfers property to C. The doctrine of *lis pendens* will apply to such transfer and if a decree is passed in favour of A, C cannot claim title over A. But if in another suit by C against B regarding the same property, decree is passed in favour of B before the suit filed by A is decided, such decree will operate as *res judicata* against A notwithstanding the doctrine of *lis pendens* and transfer in favour of C during the pendency of the suit filed by A against B.

### (11) Res judicata and withdrawal of suit<sup>39</sup>

Order 23, Rule 1 deals with withdrawal of suits. It enacts that where the plaintiff withdraws the suit or abandons his claim without the leave of the court, he will be precluded from instituting a fresh suit in respect of the same cause of action.

The distinction between *res judicata* and withdrawal of suit lies in the fact that while in the former the matter is heard and finally decided between the parties, in the latter the plaintiff himself withdraws or abandons his claim before it is adjudicated on merits.

### (12) Res judicata and estoppel<sup>40</sup>

The doctrine of *res judicata* is often treated as a branch of the law of estoppel.<sup>41</sup> *Res judicata* is really estoppel by verdict or estoppel by judgment

proceeding so as to affect the rights of any other party thereto under the decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.

39. For detailed discussion of withdrawal of suit, see, Chap. 12, *infra*.

40. S. 115 of the Evidence Act, 1872 provides:

"Estoppel. —When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing"

41. *Canada and Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd*, 1947 AC 46 at p. 56 (PC), *Guda Vijayalakshmi v Guda Ramachandra*, (1981) 2 SCC

(record).<sup>42</sup> The rule of constructive *res judicata* is nothing else but a rule of estoppel.<sup>43</sup> Even then, the doctrine of *res judicata* differs in essential particulars from the doctrine of estoppel.<sup>44</sup>

- (i) Whereas *res judicata* results from a decision of the court, estoppel flows from the act of parties.
- (ii) The rule of *res judicata* is based on public policy, viz., that there should be an end to litigation. Estoppel, on the other hand, proceeds upon the doctrine of equity, that he who, by his conduct, has induced another to alter his position to his disadvantage, cannot turn round and take advantage of such alteration of the other's position. In other words, while *res judicata* bars multiplicity of suits, estoppel prevents multiplicity of representations.
- (iii) *Res judicata* ousts the jurisdiction of a court to try a case and precludes an enquiry in limine (at the threshold); estoppel is only a rule of evidence and shuts the mouth of a party.
- (iv) *Res judicata* prohibits a man averring the same thing twice in successive litigations, while estoppel prevents him from saying one thing at one time and the opposite at another.
- (v) The rule of *res judicata* presumes conclusively the truth of the decision in the former suit, while the rule of estoppel prevents a party from denying what he has once called the truth. In other words, while *res judicata* binds both the parties to a litigation, estoppel binds only that party who made the previous statement or showed the previous conduct.

### (13) Res judicata and issue estoppel<sup>45</sup>

Section 300(1) of the Code of Criminal Procedure, 1973 declares that a person who has once been tried by a court of competent jurisdiction for

646 at p. 649; AIR 1981 SC 1143 at p. 1144; *Daryao v. State of U.P.*, AIR 1961 SC 1457; (1962) 1 SCR 574; *Swamy Atmananda v. Sri Ramakrishna Tapovanam*, (2005) 10 SCC 51; AIR 2005 SC 2392.

42. *V. Rajeshwari v. T.C. Saravanabava*, (2004) 1 SCC 551; *Lachhmi v. Bhulli*, AIR 1927 Lah 289; ILR (1927) 8 Lah 384; 104 IC 849 (FB).

43. *Batul Begam v. Hem Chandar*, AIR 1960 All 519 at p. 521; *Mohan Ram v. T.L. Sundararamier*, AIR 1960 Mad 377 (FB).

44. Woodroffe and Ameer Ali, *Law of Evidence in India* (1981 Edn.) Vol. 4 at p. 2936. See also *Sita Ram v. Amir Begam*, ILR (1886) 8 All 324 at p. 332; *Casamally v. Currimbhui*, (1911) 13 Bom LR 717. For detailed discussion of the doctrine of estoppel, see, *Authors' Lectures on Administrative Law* (2008) Lecture X; *Authors' Administrative Law* (2011) Chap. 11.

45. S 300(1) of CrPC, 1973 reads thus:

"300. Person once convicted or acquitted not to be tried for same offence.—(1) A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the

an offence and convicted or acquitted of such offence cannot be tried again for the same offence so long as the acquittal or conviction operates.

Section 11 of the Code of Civil Procedure, 1908 enacts that once the matter is finally decided by a competent court, no party to such proceeding can be allowed to reopen it in subsequent litigation. The principle is also applicable to criminal proceedings and it is not permissible in the subsequent stage of the same proceedings or in subsequent proceeding to try a person for an offence in respect of which he has been acquitted or convicted.<sup>46</sup>

Section 300 of CrPC is based on the general principle of *autrefois acquit* (formerly acquitted) or *autrefois convict* (formerly convicted).<sup>47</sup>

#### (14) Res judicata and stare decisis

"*Res judicata*" means "a thing adjudicated"; "a case already decided"; or "a matter settled by a decision or judgment".<sup>48</sup> "*Stare decisis*" means "to stand by decided cases", "to uphold precedents", "to maintain former adjudications", or "not to disturb settled law".<sup>49</sup> "Those things which have been so often adjudged ought to rest in peace."<sup>50</sup>

*Res judicata* and *stare decisis* are members of the same family. Both relate to adjudication of matters. Both deal with final determination of contested questions and have the binding effect in future litigation. Both the doctrines are the result of decisions of a competent court of law and based on public policy.

There is, however, distinction between the two. Whereas *res judicata* is based upon conclusiveness of judgment and adjudication of prior findings, *stare decisis* rests on legal principles. *Res judicata* binds parties and privies, while *stare decisis* operates between strangers also and binds courts from taking a contrary view on the point of law already decided. *Res judicata* relates to a specific controversy, *stare decisis* touches legal principle. *Res judicata* presupposes judicial finding upon the same

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same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of Section 221, or for which he might have been convicted under sub-section (2) thereof."

46 *Bhanu Kumar v. Archana Kumar*, (2005) 1 SCC 787; AIR 2005 SC 626, *Swami Atmananda v. Sri Ramakrishna Taporanam*, (2005) 10 SCC 51.

47 *Pritam Singh v. State of Punjab*, AIR 1956 SC 415 1956 Cri LJ 805. For detailed discussion of the doctrine of issue-estoppel, see, Authors *Criminal Procedure* (2011) pp. 253-57.

48 *Concise Oxford English Dictionary* (2002) at p. 1218, PR Aiyar, *Advanced Law Lexicon* (2005) Vol. IV at pp. 4090-91. Justice C. K. Thakker, *Encyclopaedic Law Lexicon* (2009) Vol. IV at p. 4144.

49 *Concise Oxford English Dictionary* (2002) at p. 1400. PR Aiyar, *Advanced Law Lexicon*, (2005) Vol. IV at pp. 4456. Justice C. K. Thakker, *Encyclopaedic Law Lexicon* (2009) Vol. IV at pp. 4478-80.

50 Lord Coke

facts as involved in subsequent litigation between the same parties. *Stare decisis* applies to same principle of law to all parties.

### (15) Res judicata and splitting of claims<sup>51</sup>

The doctrine of *res judicata* also differs from Order 2 Rule 2 of the Code; *firstly*, the former refers to a plaintiff's duty to bring forward all the grounds of attack in support of his claim, while the latter only requires a plaintiff to claim all reliefs flowing from the same cause of action. *Secondly*, while the former rule refers to both the parties, plaintiff as well as defendant, and precludes a suit as well as a defence, the latter refers only to a plaintiff and bars a suit.<sup>52</sup>

### (16) Res judicata whether technical

No doubt, the rule of *res judicata* has some technical aspects. For instance, the rule of constructive *res judicata* is really technical in nature. Similarly, pecuniary or subjectwise competence of the earlier forum to adjudicate the subject-matter or grant reliefs sought in subsequent litigation can be said to be technical. But the principle on which the doctrine is founded rests on public policy and public interest.<sup>53</sup>

### (17) Section 11 whether mandatory

Section 11 is mandatory. The plea of *res judicata* is a plea of law which touches the jurisdiction of a court to try the proceedings. A finding on that plea would oust the jurisdiction of a court. If the requirements of Section 11 are fulfilled, the doctrine of *res judicata* will apply and even a concession made by an advocate will not bind a party.<sup>54</sup>

51 Or 2 R. 2 which prohibits splitting of claims reads as under:

"**Suit to include the whole claim.**—(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court.

(2) **Relinquishment of part of claim.**—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) **Omission to sue for one of several reliefs.**—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted"

52. For detailed discussion, see *infra*, Or 2 R. 2; see also *Inacio Martins v. Narayan Hari Naik*, (1993) 3 SCC 123; AIR 1993 SC 1756, *State of Maharashtra v. National Construction Co.*, (1996) 1 SCC 735 AIR 1996 SC 2367.

53 *Daryao v. State of U.P.*, AIR 1961 SC 1457; (1962) 1 SCR 574.

54. *Talluri Venkata Seshayya v. Thadikonda Kotiswara Rao*, (1936-37) 64 IA 17; AIR 1937 PC 1; *Pandurang Dhondi v. Maruti Hari*, AIR 1966 SC 153. (1966) 1 SCR 102.

### (18) Section 11 whether exhaustive

It is well established that the doctrine of *res judicata* codified in Section 11 of the Code of Civil Procedure is not exhaustive.<sup>55</sup> Section 11 applies to civil suits. But apart from the letter of the law, the doctrine has been extended and applied since long in various other kinds of proceedings and situations by courts in England, India and other countries.<sup>56</sup>

In the case of *Lal Chand v. Radha Krishan*<sup>57</sup>, Chandrachud, J. (as he then was) observed:

"The fact that Section 11 of the Code of Civil Procedure cannot apply on its terms, the earlier proceeding before the competent authority not being a suit, is no answer to the extension of the principle underlying that section to the instant case. Section 11, it is long since settled, is not exhaustive and the principle which motivates that section can be extended to cases which do not fall strictly within the letter of the law ... . The principle of *res judicata* is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end."<sup>58</sup> (emphasis supplied)

### (19) Interpretation

The doctrine of *res judicata* should be interpreted and applied liberally. Since the rule is founded on high public policy and upon the need of giving finality to judicial decisions, a strict and technical construction should not be adopted. In deciding whether the doctrine would apply, its substance and not the form should be considered.<sup>59</sup>

55. *Narayanan Chettiar v. Annamalai Chettiar*, AIR 1959 SC 275 at p. 279; 1959 Supp (1) SCR 237; *Daryao v. State of U.P.*, AIR 1961 SC 1457; (1962) 1 SCR 574; *Arjun Singh v. Mohindra Kumar*, AIR 1964 SC 993; (1964) 5 SCR 946, 76, 118, 122, 270, 271, 273, 278, 346, 532, 533; *Gulabchand Chhotalal Parikh v. State of Gujarat*, AIR 1965 SC 1153; (1965) 1 SCR 547; *Union of India v. Nanak Singh*, AIR 1968 SC 1370 at p. 1372 (1968) 2 SCR 887; *State of Punjab v. Bua Das Kaushal*, (1970) 3 SCC 656 at p. 657; AIR 1971 SC 1676 at p. 1677; *Lal Chand v. Radha Krishan*, (1977) 2 SCC 88 at pp. 97-98; AIR 1977 SC 789 at pp. 795-96; *State of U.P. v. Nawab Hussain*, (1977) 2 SCC 806; AIR 1977 SC 1680; *Workmen v. Board of Trustees, Cochin Port Trust*, (1978) 3 SCC 119; AIR 1978 SC 1283; *Gangabai v. Chhabubai*, (1982) 1 SCC 4; AIR 1982 SC 20; *Gulam Abbas v. State of U.P.*, (1982) 1 SCC 71 at pp. 90-93; AIR 1981 SC 2198 at pp. 2212-13; *Radhasoami Satsang v. CIT*, (1992) 1 SCC 659; AIR 1992 SC 377.
56. *Halsbury's Laws of England* (3rd Edn.) Vol. 15 at p. 185; *Corpus Juris*, Vol. 34 at p. 743; *Daryao case*, AIR 1961 SC 1457; *Gulam Abbas*, (1982) 1 SCC 71; *C.P. Trust case*, (1978) 3 SCC 119.
57. (1977) 2 SCC 88; AIR 1977 SC 789.
58. *Ibid* at pp. 97-98 (SCC) at pp. 795-96 (AIR).
59. *Sheoparsan Singh v. Ramnandan Singh*, (1915-16) 43 IA 91; AIR 1916 PC 78; *Lachhmi v. Bhullu*, AIR 1927 Lah 289; ILR (1927) 8 Lah 384; 104 IC 849 (FB); *Daryao v. State of U.P.*, AIR 1961 SC 1457 (1962) 1 SCR 574.

## (20) Waiver

The plea of *res judicata* is not one which affects the jurisdiction of the court. The doctrine of *res judicata* belongs to the domain of procedure<sup>60</sup> and the party may waive the plea of *res judicata*.<sup>61</sup> Similarly, the court may decline to go into the question of *res judicata* on the ground that it has not been properly raised in the proceedings or in issues.<sup>62</sup> The plea is one which could be waived.

## (21) Conditions

It is not every matter decided in a former suit that will operate as *res judicata* in a subsequent suit. To constitute a matter as *res judicata* under Section 11, the following conditions must be satisfied<sup>63</sup>

- (I) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually (Explanation III) or constructively (Explanation IV) in the former suit (Explanation I). (Explanation VII is to be read with this condition.)
- (II) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim. (Explanation VI is to be read with this condition.)
- (III) Such parties must have been litigating under the same title in the former suit.
- (IV) The court which decided the former suit must be a court competent to try the subsequent suit or the suit in which such issue is subsequently raised.<sup>64</sup> (Explanations II and VIII are to be read with this condition.)
- (V) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the former suit. (Explanation V is to be read with this condition.)

60. *Mathura Prasad v. Dossibai N B Jeejeebhoy*, (1970) 1 SCC 613 at p. 617; AIR 1971 SC 2355 at p. 2375; *Sushil Kumar v. Gobind Ram*, (1990) 1 SCC 193; *Isabella Johnson v. M.A. Susai*, (1991) 1 SCC 494; AIR 1991 SC 993.

61. *Medapati Surayya v. Tondapu Bala Gangadhara*, AIR 1948 PC 3 at p. 7, *Sheodan Singh v. Daryao Kunwar*, AIR 1966 SC 1332 at p. 1335. (1966) 3 SCR 300, *Manicka Nadar v. Sellathamal*, 1969 SCD 955 at p. 966; AIR 1969 SC 17; *State of Punjab v. Bua Das Kaushal*, (1970) 3 SCC 656 at p. 657-58; AIR 1971 SC 1676 at p. 1677-78; *LIC v. India Automobiles & Co.*, (1990) 4 SCC 286; AIR 1991 SC 884.

62. *Daryao v. State of U P*, AIR 1961 SC 1457 (1962) 1 SCR 574

63. *Sheodan Singh v. Daryao Kunwar*, AIR 1966 SC 1332 at p. 1334 (1966) 3 SCR 300; *Syed Mohd. Salie Labbai v. Mohd. Hanifa*, (1976) 4 SCC 780 at p. 790. AIR 1976 SC 1569 at p. 1576; *Jaswant Singh v. Custodian*, (1985) 3 SCC 648 at p. 655-56 AIR 1985 SC 1096 at p. 1101; *Saroja v. Chinnusamy*, (2007) 8 SCC 329 AIR 2007 SC 3067.

64. By newly added Expln. VIII, this condition is now not necessary.

## I. Matter in issue

### (i) General

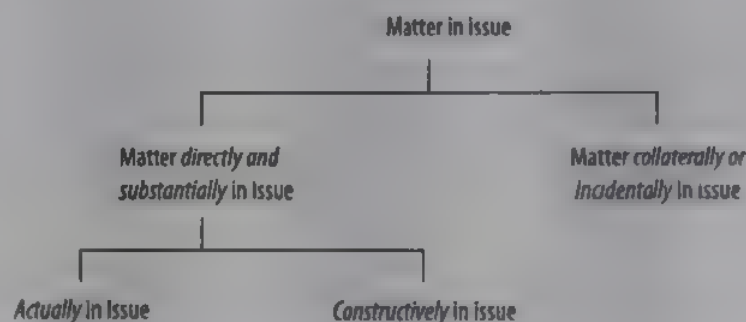
A decision of a competent court on a matter in issue may be *res judicata* in another proceeding between the same parties; the "matter in issue" may be an issue of fact, an issue of law, or one of mixed law and fact.

### (ii) Meaning

The expression "matter in issue" means the rights litigated between the parties, i.e., the facts on which the right is claimed and the law applicable to the determination of that issue.<sup>65</sup> Such issue may be an issue of fact, issue of law or mixed issue of law and fact.

### (iii) Classification

Matters in issue may be classified as under:



### (iv) Matter directly and substantially in issue: Explanation III

A matter directly and substantially in issue in a former suit will operate as *res judicata* in a subsequent suit.

"Directly" means directly, at once, immediately, without intervention. The term has been used in contradistinction to "collaterally or incidentally". A fact cannot be said to be directly in issue if the judgment stands whether that fact exists or does not exist. No hard and fast rule can be laid down as to when a matter can be said to be directly in issue and it depends upon the facts and circumstances of each case.<sup>66</sup>

65 *Mathura Prasad v Dossibai N B Jeejeebhoy*, (1970) 1 SCC 613 at p 619 AIR 1971 SC 2355 at p 2359

66 *Amalgamated Coalfields Ltd v Janapada Sabha* AIR 1964 SC 1013 at p 1019 1963 Supp (1) SC R 172 *Isher Singh v Sarwan Singh* AIR 1965 SC 948 at p 949 *Lachhman v Saraswati* AIR 1959 Bom 125, *Ramadhar Shrivastav v Bhagwandas*, (2005) 13 SCC 1

"Substantially" means essentially, materially or in a substantial manner. It is something short of certainty but indeed more than mere suspicion. It means "in effect though not in express terms".<sup>67</sup>

A matter can be said to be substantially in issue if it is of importance for the decision of a case. No rule of universal application can be laid down as to when a matter can be said to be substantial except when the parties by their conduct treated it as a substantial one.<sup>68</sup>

#### Illustrations

1. A sues B for rent due. The defence of B is that no rent is due. Here the claim for rent is the matter in respect of which the relief is claimed. The claim of rent is, therefore, a matter directly and substantially in issue.

2. A sues B for possession of certain properties on the basis of a sale deed in his favour. B impugns the deed as fictitious. The plea is upheld and the suit is dismissed. A subsequent suit for some other properties on the basis of the same sale deed is barred as the issue about the fictitious nature of the sale deed was actually in issue in the former suit directly and substantially.

The question whether or not a matter is "directly and substantially in issue" would depend upon whether a decision on such an issue would materially affect the decision of the suit. The question has to be determined with reference to the plaint, written statement, issues and judgment. No rule of universal application can be laid down and the question should be decided on the facts of each case.

When there are findings on several issues or where the court rests its decision on more than one point, the findings on all the issues or points will be *res judicata*. The Supreme Court<sup>69</sup> has rightly observed, "It is well-settled that if the final decision in any matter at issue between the parties is based by a court on its decisions on more than one point—each of which by itself would be sufficient for the ultimate decision—the decision on each of these points operates as *res judicata* between the parties."<sup>70</sup>

#### Illustrations

1. A sues B (i) for a declaration of title to certain lands; and (ii) for the rent of those lands. B denies A's title to the lands and also contends that no rent is due. In this case, there are two matters in respect of which relief is claimed, viz. (i) the title to the lands; and (ii) the claim for rent. Both these matters are, therefore, directly and substantially in issue.

67. *Pandurang Ramchandra v. Shantibai Ramchandra*, 1989 Supp (2) SCC 627 at p. 639. AIR 1989 SC 2240 at pp. 2248-49, *Lonankutty v. Thomman*, (1976) 3 SCC 528 at p. 533; AIR 1976 SC 1645 at p. 1649.

68. *Ibid*, see also *Krishna Chendra v. Challa Ramanna*, AIR 1932 PC 50.

69. *Vithal Yeshwant v. Shikandarkhan*, AIR 1963 SC 385 (1963) 2 SCR 285.

70. *Ibid*, at p. 388 (AIR), see also *Pandurang Ramchandra v. Shantibai Ramchandra*, 1989 Supp (2) SCC 627, *Ramesh Chandra v. Shuv Charan Dass*, 1990 Supp SCC 633. AIR 1991 SC 264; *Junior Telecom Officers Forum v. Union of India*, 1993 Supp (4) SCC 693. AIR 1993 SC 787.

2. A sues B for rent for the year 1989-90 alleging that B was liable to pay it. B applied for time to file the written statement, which was refused. The only issue raised by the court was regarding the amount of rent and the suit was decreed. A files another suit against B for rent for the year 1990-91. B contends that he is not liable to pay rent. The question about B's liability for all years was not alleged and decided in the previous suit and the point was, therefore, not directly and substantially in issue in the previous suit. The defence is, therefore, not barred by *res judicata*.

(v) *Matter actually in issue*

A matter is actually in issue when it is in issue directly and substantially and a competent court decides it on merits.<sup>71</sup>

(vi) *Matter constructively in issue: Explanation IV*

A matter can be said to be constructively in issue when it "might and ought" to have been made a ground of defence or attack in the former suit.<sup>72</sup>

A matter directly and substantially in issue may again be so either actually or constructively. A matter is actually in issue when it is alleged by one party and denied or admitted by the other (Explanation III). It is constructively in issue when it *might* and *ought* to have been made a ground of attack or defence in the former suit (Explanation IV). Explanation IV to Section 11 by a deeming provision lays down that any matter which might and ought to have been made a ground of defence or attack in the former suit, but which has not been made a ground of attack or defence, shall be deemed to have been a matter directly and substantially in issue in such suit.

The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter, that should be taken to be the same thing as if the matter had been actually controverted and decided. The object of Explanation IV is to compel the plaintiff or the defendant to take all the grounds of attack or defence which were open to him. In other words, all the grounds of attack and defence must be taken in the suit. A party is bound to bring forward his *whole case* in respect of the matter in issue and cannot abstain from relying or giving up any ground which is in controversy and for consideration before a Court and afterwards make it a cause of action for a fresh suit.<sup>73</sup>

71 *Lonankutty v Thomman* (1976) 3 SCC 528 at p. 533 AIR 1976 SC 1645 at p. 1649; *Mathura Prasad v Dossibai N B Jeejeebhoy*, (1970) 1 SCC 613 at p. 617 AIR 1971 SC 2355 at p. 2357.

72 See Explan IV to S. 11.

73 *Nirmal Kishore v Niranjan Ara* (1973) 2 SCC 189 at p. 192 AIR 1973 SC 1406 at p. 1409; *Jaswant Singh v Custodian* (1985) 3 SCC 648 AIR 1985 SC 1096; *Forward Construction Co v Pragna Mandal (Regd.)*, (1986) 1 SCC 100 AIR 1986 SC 391; *Direct Recruit Cases*

*(vii) Constructive res judicata*

The rule of direct *res judicata* is limited to a matter actually in issue alleged by one party and either denied or admitted by the other party expressly or impliedly. But the rule of constructive *res judicata* engrafted in Explanation IV to Section 11 of the Code is an "artificial form of *res judicata*", and provides that if a plea could have been taken by a party in a proceeding between him and his opponent, he should not be permitted to take that plea against the same party in a subsequent proceeding with reference to the same subject-matter. That clearly is opposed to considerations of public policy on which the doctrine of *res judicata* is based and would mean harassment and hardship to the opponent. Besides, if such a course is allowed to be adopted, the doctrine of finality of judgments pronounced by courts would also be materially affected.<sup>74</sup> Thus, it helps in raising the bar of *res judicata* by suitably construing the general principles of subduing a cantankerous litigant. That is why this rule is called constructive *res judicata*, which, in reality, is an aspect or amplification of the general principles of *res judicata*.<sup>75</sup>

As rightly observed by Somervell, L.J., "I think that ... it would be accurate to say that *res judicata* ... is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."<sup>76</sup>

(emphasis supplied)

In the case of *Workmen v. Board of Trustees, Cochin Port Trust*<sup>77</sup>, the Supreme Court explained the principle of constructive *res judicata* in the following words:

"If by any judgment or order any matter in issue has been directly and explicitly decided, the decision operates as *res judicata* and bars the trial of an identical issue in a subsequent proceeding between the same parties. The principle of *res judicata* also comes into play when by the judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implication; then also the principle of *res judicata* on that issue is directly applicable. When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of law, to

*Il Engg. Officers' Assn. v. State of Maharashtra*, (1990) 2 SCC 715 at p. 741; AIR 1990 SC 1607, *P.K. Vijayan v. Kamalakshi Amma*, (1994) 4 SCC 53, AIR 1994 SC 2145, *Ramadhar Shrivastava v. Bhagwandas*, (2005) 13 SCC 1; *State of Karnataka v. All India Manufacturers Organisation*, (2006) 4 SCC 683, AIR 2006 SC 1846.

74. *Devilal Modi v. STO*, AIR 1965 SC 1150 (1965) 1 SCR 686.

75. *State of U.P. v. Nawab Hussain*, (1977) 2 SCC 806, AIR 1977 SC 1680.

76. *Greenhalgh v. Mallard*, (1947) 2 All ER 255 at p. 257.

77. (1978) 3 SCC 119; AIR 1978 SC 1283.

*avoid multiplicity of litigation and to bring about finality in it is deemed to have been constructively in issue and, therefore, is taken as decided.*"<sup>78</sup>

(emphasis supplied)

### *Illustrations*

1. A sues B for possession of property on the basis of ownership. The suit is dismissed. A cannot thereafter claim possession of property as mortgagee as that ground ought to have been taken in the previous suit as a ground of attack.

2. A files a suit against B for declaration that he is entitled to certain lands as heir of C. The suit is dismissed. The subsequent suit, claiming the same property on the ground of adverse possession, is barred by constructive *res judicata*.

3. A files a suit against B to recover money on a promote. B contends that the promissory note was obtained from him by undue influence. The objection is overruled and suit is decreed. B cannot challenge the promissory note on the ground of coercion or fraud in subsequent suit, inasmuch as he ought to have taken that defence in the former suit.

4. A sues B to recover damages for a breach of contract and obtains a decree in his favour. B cannot afterwards sue A for recession of contract on the ground that it did not fully represent the agreement between the parties, since that ground ought to have been taken by him in the previous suit as a ground of defence.

5. A sues B for possession of certain property alleging that it has come to his share on partition of joint family property. B's contention that the partition has not taken place is upheld by the court and the suit is dismissed. A subsequent suit by A against B for partition of joint family property is not barred.

6. As a mortgagor A sues B for redemption of certain property alleging that he has mortgaged it with possession to B. The mortgage is not proved and the suit is dismissed. A files another suit against B for possession of the same property claiming to be the owner thereof. The suit is not barred.

7. A sues B to recover certain property alleging that B was holding the property under a lease, which had expired. The lease is not proved and the suit is dismissed. A subsequent suit by A against B on the basis of general title is not barred.

8. A sues B for a declaration that he is entitled to certain property as an heir of X. The suit is dismissed. A files another suit for injunction on the ground that he had become an owner of the property by adverse possession. This ground was available to him even at the time of previous suit but was not taken at that time. The subsequent suit is barred.

9. A sues B for a declaration that he is the owner of certain property. The suit is dismissed holding that he is not the owner. At the time of the suit A is in adverse possession of the property but has not perfected his title. After the statutory period, A files another suit on the basis of his title by adverse possession. The suit is not barred.

78 *Ibid.* at pp. 124-25 (SCC) at p. 1287 (AIR). See also *Ahmedabad Mfg. Co. v. Workmen*, (1981) 2 SCC 663, AIR 1981 SC 960; *Pondicherry Khadi & Village Industries Board v. P. Kulathangan* (2004) 1 SCC 68, AIR 2003 SC 4701.

In *State of U.P. v. Nawab Hussain*<sup>79</sup>, A, a sub-inspector of police, was dismissed from service by the D.I.G. He challenged the order of dismissal by filing a writ petition in the High Court on the ground that he was not afforded a reasonable opportunity of being heard before the passing of the order. The contention was, however, negatived and the petition was dismissed. He then filed a suit and raised an additional ground that since he was appointed by the I.G.P., the D.I.G. had no power to dismiss him. The State contended that the suit was barred by constructive *res judicata*. The trial court, the first appellate court as well as the High Court held that the suit was not barred by *res judicata*. Allowing the appeal filed by the State, the Supreme Court held that the suit was barred by constructive *res judicata* as the plea was within the knowledge of the plaintiff and could well have been taken in the earlier writ petition. The same principle applies to pleas which were taken but not pressed at the time of hearing.<sup>80</sup>

Explaining the doctrine in the decision of *Forward Construction Co. v. Prabhat Mandal (Regd.)*<sup>81</sup>, the Supreme Court observed:

"An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject-matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructive in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided."<sup>82</sup> (emphasis supplied)

In the leading case of *Devilal Modi v. STO*<sup>83</sup>, A challenged the validity of an order of assessment under Article 226. The petition was dismissed on merits. An appeal against that order was also dismissed by the Supreme Court on merits. A again filed another writ petition in the same High Court against the same order of assessment by taking some additional grounds. The High Court dismissed the petition on merits. On appeal, the Supreme Court held that the petition was barred by the principle of constructive *res judicata*.

Speaking for the court, Gajendragadkar, C.J. observed, "[T]hough the courts dealing with the question of the infringement of fundamental rights must consistently endeavour to sustain the said rights and should strike down their unconstitutional invasion, it would not be right to

79. (1977) 2 SCC 806. AIR 1977 SC 1680.

80. *Nirmal Enem v. Jahan Ara*, (1973) 2 SCC 189 at p. 192. AIR 1973 SC 1406 at p. 1409

81. (1986) 1 SCC 100: AIR 1986 SC 391.

82. *Ibid.* at p. 112 (SCC): at pp. 397-98 (AIR).

83. AIR 1965 SC 1150: (1965) 1 SCR 686.

ignore the principle of *res judicata* altogether in dealing with writ petitions filed by citizens alleging the contravention of their fundamental rights. Considerations of public policy cannot be ignored in such cases, and the basic doctrine that judgment pronounced by this Supreme Court are binding and must be regarded as final between the parties in respect of matters covered by them must receive due consideration."<sup>84</sup>

Dealing with the possibility of abuse of process of law, the learned Chief Justice made the following remarkable observations which are worth quoting:

"[I]n the present case the appellants sought to raise additional points when he brought his appeal before this Court by special leave; that is to say, he did not take all the points in the writ petition and thought of taking new points in appeal. When leave was refused to him by this Court to take those points in appeal, he filed a new petition in the High Court and took those points, and finding that the High Court decided against him on the merits of those points, he has come to this Court; but that is not all. At the hearing of this appeal, he has filed another petition asking for leave from this Court to take some more additional points and that shows that if constructive *res judicata* is not applied to such proceedings a party can file as many petitions as he likes and take one or two points every time. That clearly is opposed to considerations of public policy on which *res judicata* is based and would mean harassment and hardship to the opponent. Besides, if such a course is allowed to be adopted, the doctrine of finality of judgments pronounced by this Court would also be materially affected."<sup>85</sup>

(emphasis supplied)

#### (viii) *Might and ought*

The primary object of Explanation IV is to cut short the litigation by compelling the parties to the suit to rely upon all grounds of attack or defence which are available to them. If the plaintiff or defendant fails to take up such ground which he "might" and "ought" to have taken, it would be treated to have been raised and decided.<sup>86</sup>

84. *Ibid* at p 1153 (AIR).

85. *Ibid* at p. 1153 (AIR), see also, the following observations of Lord Shaw in *Hovstead v. Commr of Taxation*, 1926 AC 155 1925 All ER Rep 56 at p 62 (PC) "Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or weight of certain circumstances. If this were permitted, litigation would have no end except when legal ingenuity is exhausted" (emphasis supplied)

86. *Nirmal Enem v Jahan Ara*, (1973) 2 SCC 189, AIR 1973 SC 1406, *Devital v. STC*, AIR 1965 SC 1150, *Gulabchand Chhotalal Parikh v State of Gujarat*, AIR 1965 SC 1153 (1965) 1 SCR 547, *State of U P v Nawab Hussain*, (1977) 2 SCC 806 AIR 1977 SC 1680, *Workmen v Board of Trustees Cochin Port Trust* (1978) 3 SCC 119 AIR 1978 SC 1283, *P K Vijayan v Kamalakshi Amma*, (1994) 4 SCC 53 AIR 1994 SC 2145

The expression "might" and "ought" are of wide import. The word "might" presupposes the party affected had knowledge of the ground of attack or defence at the time of the previous suit. "Ought" compels the party to take such ground. The word "and" between the terms "might" and "ought" must be read as conjunctive (*and*) and not disjunctive (*or*). And unless it is proved that the matter might *and* ought to have been raised in the previous litigation, there is no constructive *res judicata*.<sup>87</sup>

The question whether a matter "might" have been made a ground of attack or defence in a former suit rarely presents any difficulty. Whether it "ought" to have been made a ground of attack or defence depends upon the facts of each case. No rigid rule can be laid down in this regard. One of the tests, however, is to see whether by raising the question the decree which was passed in a previous suit should have been defeated, varied or in any way affected. If the question is of such a nature, it must be deemed to be a question which ought to have been raised in the former suit.<sup>88</sup>

#### (ix) *Matter collaterally or incidentally in issue*

The words "directly and substantially in issue" have been used in Section 11 in contradistinction to the words "collaterally or incidentally in issue". Decisions on matters collateral or incidental to the main issues in a case will not operate as *res judicata*.

A collateral or incidental issue means an issue which is ancillary to the direct and substantive issue. It refers to a matter in respect of which no relief is claimed and yet it is put in issue to enable a court to adjudicate upon the matter which is directly and substantially in issue. The expression "collaterally or incidentally in issue" implies that there is another matter which is "directly and substantially in issue".

#### *Illustration*

A sues B for the rent due. B pleads abatement of rent on the ground that the actual area of the land is less than that mentioned in the lease deed. The court, however, finds the area greater than that shown in the lease deed. The finding as to the excess area, being ancillary and incidentally to the direct and substantial issue, is not *res judicata*.

Thus, in *Gangabai v. Chhabubai*<sup>89</sup>, a regular civil suit was filed by A against B for a declaration that she was the owner of the property and

87. *Ibid*, see also *Govt. of the Province of Bombay v. Pestonji Ardeshir Wadia*, (1948-49) 76 IA 85 AIR 1949 PC 143; *Ramesh Chand v. Board of Revenue*, AIR 1973 All 120 (FB), *Durga Parshad v. Custodian of Evacuee Property*, AIR 1960 Punj 341 (1960) 2 Punj 159 (FB).

88. *Mulla, Civil Procedure Code* (2007) Vol. 1 at pp. 240-49, *Kameswar Pershad v. Rajkumari Ruttun*, (1891-92) 19 IA 234. ILR (1893-94) 20 Cal 79 at p. 85 (PC), *Mooloo Vijaya Raganadha v. Katama Natchair*, (1866) 11 MIA 50.

89. (1982) 1 SCC 4. AIR 1982 SC 20.

the so-called sale deed said to have been executed by her in favour of *B* was not real and genuine, and also for possession of property on the ground of title. *B* contended that he had become the owner of the property and the decree for arrears of rent had been previously passed by the Court of Small Causes in his favour, negating the contention of *A* that she was the owner. She had been held to be the tenant. The subsequent suit, it was contended, was, therefore, barred by the doctrine of *res judicata*.

Negating the contention, the Supreme Court observed:

"It seems to us that when a finding as to title to immovable property is rendered by a Court of Small Causes, *res judicata* cannot be pleaded as a bar in a subsequent regular civil suit for the determination or enforcement of any right or interest in immovable property. In order to operate as *res judicata* the finding must be one disposing of a matter directly and substantially in issue in the former suit and the issue should have been heard and finally decided by the court trying such suit. *A matter which is collaterally or incidentally in issue for the purpose of deciding the matter which is directly in issue in the case cannot be made the basis of a plea of res judicata.*"<sup>90</sup>  
(emphasis supplied)

Accordingly, the Supreme Court held that the finding rendered by the Court of Small Causes in the suit filed by *B* that the document executed by *A* was a sale deed cannot operate as *res judicata* in the subsequent suit (suit filed by *A* against *B* on the basis of title).

(x) "*Matter directly and substantially in issue*" and "*matter collaterally or incidentally in issue*": Distinction

In order to operate *res judicata*, a matter must have been directly and substantially in issue in a former suit and not merely collaterally or incidentally in issue therein. It is, therefore, necessary to draw a distinction between a matter "directly and substantially in issue" and a matter "collaterally or incidentally in issue".

A matter is "directly and substantially in issue" if it is necessary to decide it in order to adjudicate the principal issue and if the judgment is based upon that decision<sup>91</sup>

A matter is "collaterally or incidentally in issue" if it is necessary to decide it in order to grant relief to a plaintiff or to a defendant and the decision on such issue either way does not affect the final judgment<sup>92</sup>

Whether a matter was directly and substantially in issue or merely collaterally or incidentally in issue has to be determined with reference

90. *Gangabai v Chhabubai*, (1982) 1 SCC 4; AIR 1982 SC 20 see also, *LIC v India Automobiles & Co.*, (1990) 4 SCC 286, *Rameshwar Daval v Banda*, (1993) 1 SCC 531.

91. *Amalgamated Coalfields Ltd v Janapada Sabha*, AIR 1964 SC 1013 at p 1019 1963 Supp (1) SCR 172

92. *Ibid.*, see also *Isher Singh v Sarwan Singh*, AIR 1965 SC 948 at p 950

to plaint, written statement, issues and judgment in the suit. Such question must be decided on the facts of each case and no "cut and dried" test can be laid down.<sup>93</sup>

**(xi) Findings on several issues**

Where there are findings on several issues or where the court rests its decision on more than one point, the findings on all the issues will operate as *res judicata*.

The Supreme Court<sup>94</sup> has stated, "It is well-settled that if the final decision in any matter at issue between the parties is based by a court on its decision on more than one point, each of which by itself would be sufficient for the ultimate decision, the decision on each of these points operates as *res judicata* between the parties".

**(xii) Findings on matter not in issue**

If a finding is recorded by a court in a former suit on a question not in issue between the parties, it will not operate as *res judicata*. The same result will follow if the matter is not dealt with by the court or merely an opinion has been expressed over a question which did not directly arise in the suit.<sup>95</sup>

**(xiii) "Suit": Meaning**

The expression "suit" has not been defined in the Code, but it is a proceeding which is commenced by presentation of a plaint.<sup>96</sup> In *Hansraj Gupta v. Official Liquidators of The Dehra Dun-Mussoorie Electric Tramway Co. Ltd.*<sup>97</sup>, Their Lordships of the Privy Council have defined the expression thus, "The word 'suit' ordinarily means and, apart from some context, must be taken to mean a civil proceeding instituted by the presentation of a plaint."

In *Pandurang Ramchandra v. Shantibai Ramchandra*<sup>98</sup>, the Supreme Court has stated, "In its comprehensive sense the word "suit" is understood

93. *Isher Singh v. Sarwan Singh*, AIR 1965 SC 948

94. *Vithal Yeshwant v. Shikandarkhan*, AIR 1963 SC 385; (1963) 2 SCR 285; *Pandurang Ramchandra v. Shantibai Ramchandra*, 1989 Supp (2) SCC 627; AIR 1989 SC 2240, *Junior Telecom Officers Forum v. Union of India*, 1993 Supp (4) SCC 693; AIR 1993 SC 787.

95. *Bejoy Gopal v. Pratul Chandra*, AIR 1953 SC 153; 1953 SCR 930; *Ragho Prasad v. Shri Krishna*, AIR 1969 SC 316; (1969) 1 SCR 834, *Ram Nandan Prasad Narayan Singh v. Kapildeo Ramjee*, AIR 1951 SC 155; 1951 SCR 138.

96. S. 26.

97. (1932-33) 60 IA 13; AIR 1933 PC 63.

98. 1989 Supp (2) SCC 627 at p. 639; AIR 1989 SC 2240 at p. 2248, *Kailash Nath v. Pradeshiya Industrial & Investment Corpn. of U P. Ltd.*, (2003) 4 SCC 305. AIR 2003 SC 1886.

to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords. The modes of proceedings may be various but that if a right is litigated between the parties in a court of justice the proceeding by which the decision of the court is sought may be a suit." Formerly, looking to the legislative background of Section 11, the expression "suit" was construed literally and grammatically including the whole of the suit and not a part thereof or a material issue arising therein. But by the Amendment Act of 1976, a more extensive meaning is given to the connotation "suit" and now the mode of a proceeding is not material. At the same time, however, if the proceeding is of a summary nature not falling within the definition of a suit, it may not be so treated for the purpose of Section 11. Again, the word "suit" in Section 11 means proceedings in a court of first instance as distinguished from proceedings in an appellate court, though the general principles of *res judicata* apply to appellate proceedings also.<sup>99</sup>

#### (xiv) *Former suit: Explanation I*

Section 11 provides that no court shall try any suit or issue in which the matter has been directly and substantially in issue in a *former* suit between the same parties and has been heard and finally decided. Explanation I to Section 11 provides that the expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.<sup>100</sup> It is not the date on which the suit is filed that matters but the date on which the suit is decided; so that even if a suit was filed later, it will be a former suit within the meaning of Explanation I if it has been decided earlier.<sup>101</sup>

#### (xv) "Issue": Meaning

Section 11 bars trial of any suit as well as an issue which had been decided in a former suit. Issues are of three kinds: (i) Issues of fact; (ii) Issues of law; and (iii) Mixed issues of law and fact. A decision on an issue of fact, however erroneous it may be, constitutes *res judicata* between the parties to the previous suit, and cannot be reagitated in collateral proceedings.<sup>102</sup> A mixed issue of law and fact also, for the same

99 *Lachhmi v. Bhullu*, AIR 1927 Lah 289 ILR (1927) 8 Lah 384 104 IC 849 (FB)

100 *Lonankutty v. Thomman*, (1976) 3 SCC 528 at p. 533 AIR 1976 SC 1645 at p. 1649  
*Venkateshwara v. Narayana Prabhu*, (1977) 2 SCC 181 at p. 188 AIR 1977 SC 1268 at p. 1273

101 *Sheodan Singh v. Daryao Kunwar* AIR 1966 SC 1332 at p. 1334 (1966) 3 SCR 300 R  
*Viswanathan v. Rukn-ul-Mulk Sued Abdul*, AIR 1963 SC 1 at p. 10 (1963) 3 SCR 22

102 *Mathura Prasad v. Dossibai N.B. Jerjeebhoy*, (1970) 1 SCC 613. See also *Ravendra Uha v. Labour Court* 1984 Supp SCC 520 at pp. 526-27 AIR 1984 SC 1696 at p. 1699 700

reasons, operates as *res judicata*.<sup>103</sup> But there were conflicting views on the question as to how far a decision on a question of law would operate as *res judicata*.<sup>104</sup>

But the conflict was set at rest by the powerful pronouncement of the Supreme Court in the case of *Mathura Prasad v. Dossibai N.B. Jeejeebhoy*<sup>105</sup>, wherein after considering the case-law on the point, the court held that generally a decision of a competent court even on a point of law operates as *res judicata*.<sup>106</sup> However, a pure question of law unrelated to facts which gives rise to a right does not operate as *res judicata*. Thus, when the cause of action is different, or when the law has since the earlier decision been altered by a competent authority, or when the decision relates to the jurisdiction of a Court to try the earlier proceeding, or where the earlier decision declared valid a transaction which is prohibited by law, the decision does not operate as *res judicata* in a subsequent proceeding.

A reference may be made to *Avtar Singh v. Jagjit Singh*<sup>107</sup>, wherein a peculiar problem arose. In a suit filed by A in a civil court, a preliminary contention regarding jurisdiction of the Court was taken by B. The objection was upheld and the plaint was returned to the plaintiff for presentation to the Revenue Court. When A approached the Revenue Court, it returned the petition holding that the Revenue Court had no jurisdiction. Once again, A filed a civil suit in a civil court. It was contended by B that the suit was barred by *res judicata*. The Court, though it sympathised with the dilemma wherein the plaintiff was placed and was driven from pillar to post, dismissed the suit upholding the contention of the defendant. The Court stated, "If defendant does not appear and the Court on its own returns the plaint on the ground of lack of jurisdiction the order in a subsequent suit may not operate as *res judicata* but if the defendant appears and an issue is raised and decided then the decision on the question of jurisdiction will operate as *res judicata* in a subsequent suit although the reasons for its decisions may not be so."<sup>108</sup>

It is submitted that the view taken by the Supreme Court in *Avtar Singh*<sup>109</sup> is erroneous and does not lay down correct law. As stated above,

103 *Mathura Prasad v. Dossibai N.B. Jeejeebhoy*, (1970) 1 SCC 613; *Sushil Kumar v. Gobind Ram*, (1990) 1 SCC 193, *Supreme Court Employees' Welfare Assn. v. Union of India*, (1989) 4 SCC 187; AIR 1990 SC 334.

104 *Ibid*, see also *Mohanlal Goenka v. Benoy Krishna*, AIR 1953 SC 65 at p. 72-73 1953 SCR 377; *State of W.B. v. Hemant Kumar*, AIR 1966 SC 1061 at p. 1066; 1963 Supp (2) SCR 542; *Avtar Singh v. Jagjit Singh*, (1979) 4 SCC 83.

105. (1970) 1 SCC 613 at p. 617. AIR 1971 SC 2355 at pp. 2357-58.

106. *Ibid*, at p. 617 (SCC) at p. 2337 (AIR).

107. (1979) 4 SCC 83 AIR 1979 SC 1911

108. *Ibid*, at p. 84 (SCC) at p. 1912 (AIR).

109. (1979) 4 SCC 83 AIR 1979 SC 1911.

a pure question of law unrelated to the facts and touching the jurisdiction of a court, does not operate as *res judicata* between the same parties in a subsequent suit. *Avtar Singh*<sup>110</sup> was decided by a Division Bench of two judges. Unfortunately, *Mathura Prasad*<sup>111</sup> which was decided earlier and that too by a Division Bench of three judges was not brought to the notice of the Court. Thus, *Avtar Singh*<sup>112</sup> was decided *per incurium* and cannot be said to be good law.<sup>113</sup>

It is submitted that the view taken by the Supreme Court in *Mathura Prasad v. Dossibai N.B. Jeejeebhoy*<sup>114</sup> is correct. The following observations of Shah, J. (as he then was) lay down the correct principle of law and are, therefore, worth quoting:

"The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties. But, where the decision is on a question of law, i.e., the interpretation of a statute, it will be *res judicata* in a subsequent proceeding between the same parties where the cause of action is the same, for the expression 'the matter in issue' in Section 11 of the Code of Civil Procedure means the right litigated between the parties, i.e., the facts on which the right is claimed or denied and the law applicable to the determination of that issue. Where, however, the question is one purely of law and it relates to the jurisdiction of the court or a decision of the court sanctioning something which is illegal, by resort to the rule of *res judicata* a party affected by the decision will not be precluded from challenging the validity of that order under the rule of *res judicata*, for a rule of procedure cannot supersede the law of the land."<sup>115</sup> (emphasis supplied)

## II. Same parties

### (i) General

The second condition of *res judicata* is that the former suit must have been a suit between the same parties or between the parties under

110. *Ibid.*

111. (1970) 1 SCC 613 at p. 617 AIR 1971 SC 2355 at p. 2357-58

112. (1979) 4 SCC 83 AIR 1979 SC 1911

113. *Sushil Kumar v. Gobind Ram*, (1990) 1 SCC 193 at pp. 205-06, *Isabella Johnson v. M. A. Susai*, (1991) 1 SCC 494 at p. 496 AIR 1991 SC 993 at p. 995.

114. (1970) 1 SCC 613 AIR 1971 SC 2355

115. *Mathura Prasad v. Dossibai N.B. Jeejeebhoy*, (1970) 1 SCC 613 at p. 629 AIR 1971 SC 2355 at p. 2359, see also, observations of Rankin, CJ in *Tarini Charan v. Kedar Nath*, AIR 1928 Cal 777 ILR (1928) 56 Cal 723 33 CWN 126, *Chief Justice of A.P. v. I.V.A. Dixitulu*, (1979) 2 SCC 34 at p. 42 AIR 1979 SC 193 at p. 198 *Jaisingh v. Mamanchand* (1980) 3 SCC 162 at p. 167-69 AIR 1980 SC 1201 *Ravendra Ina case*, 1984 Supp SC C 520, *Kirit Kumar v. Union of India* (1981) 2 SCC 436 AIR 1981 SC 1621 *Sonepat Coop. Sugar Mills Ltd. v. Anil Singh*, (2005) 3 SCC 232 AIR 2005 SC 1050

whom they or any of them claim. This condition recognises the general principle of law that judgments and decrees bind the parties and privies.<sup>116</sup> Therefore, when the parties in the subsequent suit are different from the former suit, there is no *res judicata*.

### (ii) Illustrations

1. A sues B for rent. B contends that A is not the landlord, and the suit is dismissed. A subsequent suit either by A or by X claiming through A is barred by *res judicata*.

2. A sues B for rent. B contends that C and not A is the landlord. A fails to prove his title and the suit is dismissed. A then sues B and C for a declaration of his title to the property. The suit is not barred as the parties in both the suits are not the same.

### (iii) Party: Meaning

A "party" is a person whose name appears on the record at the time of the decision. Thus, a person who has intervened in the suit is a party, but a party to the suit whose name is struck off, or who is discharged from the suit or who dies pending the suit but whose name continues on record erroneously is not a party. A party may be a plaintiff or a defendant.

### (iv) Other persons

Persons other than the parties may be divided in the following categories:<sup>117</sup>

- (a) persons who claim under the parties to the suit, generally known as "privies";
- (b) persons not claiming under the parties but represented by them;<sup>118</sup>
- (c) interveners;<sup>119</sup>
- (d) minors;<sup>120</sup>
- (e) strangers.

So far as (a) and (b) are concerned, they really represent the parties and hence, a decision between the parties in an earlier suit would operate as *res judicata*. In *Pandit Ishwardas v. State of M.P.*<sup>121</sup>, the Supreme Court

116. "*Res inter alios acta alteri nocere non debet*" (Things done between strangers ought not to injure anyone).

117. *Ahmedbhoy v. Valleebhoy Cassumbhoy*, ILR (1882) 6 Bom 703.

118. *Ibid*, see also *Ishwardas v. State of M P.*, *infra*.

119. See, under that head, *infra*

120. See, under that head, *infra*.

121. (1979) 4 SCC 163; AIR 1979 SC 551. (1979) 2 SCR 424.

stated, "In order to sustain the plea of *res judicata* it is not necessary that all the parties to the two litigations must be common. All that is necessary is that the issue should be between the same parties or between the parties under whom they or any of them claim". (emphasis supplied)

Strangers are not bound by a decree passed between the parties to a suit.<sup>122</sup>

#### (v) *Res judicata* between co-defendants

As a matter may be *res judicata* between a plaintiff and a defendant, similarly, it may be *res judicata* between co-defendants and co-plaintiffs also. An adjudication will operate as *res judicata* between co-defendants if the following conditions are satisfied:

- (1) There must be a conflict of interest between co-defendants;
- (2) It must be necessary to decide that conflict in order to give relief to the plaintiff;
- (3) The question between co-defendants must have been finally decided; and
- (4) The co-defendants were necessary or proper parties in the former suit.

If these conditions are satisfied, the adjudication will operate as *res judicata* between co-defendants.<sup>123</sup>

#### Illustration

A sues B, C and D and in order to decide the claim of A, the Court has to interpret a will. The decision regarding the construction of the will on rival claims of the defendants will operate as *res judicata* in any subsequent suit by any of the defendants against the rest.

The test for *res judicata* between co-defendants has been laid down in the case of *Cottingham v. Earl of Shrewsbury*<sup>124</sup> in the following words:

"If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide the case, and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the

122 "Res inter alios acta alteri nocere non debet" (Things done between strangers ought not to injure anyone)

123 *Munni Bibi v. Jiricki Nath* (1930-31) 58 IA 158 AIR 1931 PC 114; *Iftikhar Ahmad v. Sued Meharban Ali*, (1974) 2 SCC 151 at p. 155 AIR 1974 SC 749 at p. 751; *Sheodan Singh v. Daryao Kunwar* AIR 1966 SC 1332 (1966) 3 SCR 300; *State of Gujarat v. Dhiphnai Shaligram Patil*, (2006) 8 SCC 72 AIR 2006 SC 3091; *Mahboob Sahab v. Sued Ismail*, (1995) 3 SCC 693 AIR 1995 SC 1205; *Makhna Construction & Engg. (P) Ltd. v. Indore Development Authority*, (2005) 6 SCC 304 AIR 2005 SC 2409; *Amarendra Komalam v. Usha Sinha*, (2005) 11 SCC 257 AIR 2005 SC 2258.

124 (1843) 3 Hare 627; see also *Mahboob Sahab v. Sued Ismail*, (1995) 3 SCC 693.

co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains."<sup>125</sup>

In *Mahboob Sahab v. Syed Ismail*<sup>126</sup>, the Supreme Court added a word of caution while applying the doctrine of *res judicata* between co-defendants by stating, "The doctrine of *res judicata* would apply even though the party against whom it is sought to be enforced, was not *eo nomine* made a party nor entered appearance nor did he contest the question. The doctrine of *res judicata* must, however, be applied to co-defendants with great care and caution. The reason is that fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice. If a party obtains a decree from the court by practising fraud or collusion, he cannot be allowed to say that the matter is *res judicata* and cannot be reopened."<sup>127</sup> (emphasis supplied)

#### (vi) *Res judicata* between co-plaintiffs

Just as a matter may be *res judicata* between co-defendants, so also it may be *res judicata* between co-plaintiffs. If there is a conflict of interest between plaintiffs and it is necessary to resolve the same by a court in order to give relief to a defendant, and the matter is in fact decided, it will operate as *res judicata* between co-plaintiffs in the subsequent suit.<sup>128</sup>

#### (vii) *Pro forma* defendant

A defendant to a suit against whom no relief is claimed is called a *pro forma* defendant. A person may be added as a *pro forma* defendant in a suit merely because his presence is necessary for a complete and final decision of the questions involved in the suit.<sup>129</sup> In such a case, since no relief is sought against him, a finding does not operate as *res judicata* in a subsequent suit against him.<sup>130</sup> On the other hand, the fact that the party is described as a *pro forma* defendant or that no relief is claimed

125. *Ibid*, at p. 638. See also *Munni Bibi v. Tirloki Nath*, (1930-31) 58 IA 158: AIR 1931 PC 114; *Kshiroda v. Debendra Nath*, AIR 1957 Cal 200.

126. (1995) 3 SCC 693 AIR 1995 SC 1205.

127. *Ibid*, at p. 699 (SCC) at p. 1209 (AIR) (per K. Ramaswamy, J.); see also *Saroja v. Chinnusamy*, (2007) 8 SCC 329: AIR 2007 SC 3067.

128. *Iftikhar Ahmed v. Syed Meharban Ali*, (1974) 2 SCC 151 at p. 155: AIR 1974 SC 749 at p. 751.

129. Or 1 R. 10(2).

130. *Rahimbhoy v. Charles Agnew Turner*, ILR (1893) 17 Bom 341 at p. 348 (PC); *Gita Ram v. Prithvi Singh*, AIR 1956 Cal 129 (FB), *Pallapothu Narasimha v. Kidanbi Radhakrishnamacharyulu*, AIR 1978 AP 319 at p. 332 (FB).

against him is, by itself, not sufficient to avoid the bar of *res judicata* if other conditions laid down in the section are satisfied.<sup>131</sup>

#### Illustrations

1. A sues B for possession of property contending that he is a tenant of C. C is joined as *pro forma* defendant and no relief is claimed against him. The suit is dismissed as the Court finds B to be the owner. C then sues B for possession on the basis of title. B's contention that the issue regarding ownership of property is *res judicata* must fail as the issue was decided in the former suit between A and B and not between C and B as C was only a *pro forma* defendant.

2. A sues B for rent claiming to be a sole shebait. B contends that X was also a co-shebait and the suit filed by A alone was, therefore, not maintainable. X was joined as *pro forma* defendant and no relief was claimed against him. A finding by the Court that A was the sole shebait would operate as *res judicata* in a subsequent suit between X and A on the question of co-shebaitship as the decision in the previous suit was necessary for granting relief in favour of A.

#### (viii) Interveners

An "intervener" is one "who intervenes in a suit in which he was not originally a party",<sup>132</sup> "an affected party who, with the court's permission, participates in a law suit after its inception by either joining with the plaintiff or uniting with the defendant."<sup>133</sup>

A person may intervene in a suit either on his own behalf or on behalf of the parties with the leave of the court. Such intervener is considered to be a party to the suit once he is permitted to intervene no matter at what stage of the suit he intervenes. The decision in the suit then will operate as *res judicata* in a subsequent suit by or against such person (intervener) on the point already decided.<sup>134</sup>

#### (ix) Minors

When a suit is filed against a minor who is duly represented by a guardian or next friend and a decree is passed in such suit, the decree binds the minor. But if the decree is obtained against a minor not represented by a guardian or there is fraud, collusion or gross negligence of the

131 *Munni Bibi v Tirloki Nath*, (1930-31) 58 IA 158 AIR 1931 PC 114. *Maung Sein v Ma Pan Nyun*, (1931-32) 59 IA 247 AIR 1932 PC 161 at p. 164. *Kshiroda v Debendra Nath*, AIR 1957 Cal 200.

132 *Concise Oxford English Dictionary* (2002) at p. 741.

133 PR Aiyar, *Advanced Law Lexicon* (2005) Vol. II at p. 2434. see also, VG Ramachandran, *Law of Writs* (2006) pp. 1562-64.

134 *Rai Lakshmi v Banamani Sen*, AIR 1953 SC 33 1953 SCR 154. For detailed discussion see, VG Ramachandran, *Law of Writs* (2006) Vol. II, Pt. V, Chap. 1.

guardian, a decree passed in the suit will not operate as *res judicata* against him (minor) in a subsequent suit.<sup>135</sup>

(x) *Parties under whom they or any of them claim*

As stated above, the doctrine of *res judicata* operates not only against parties but their privies also, i.e., persons claiming under parties to the decision. The object underlying the doctrine of *res judicata* is that if a proceeding originally instituted is proper, the decision given therein is binding on all persons on whom a right or interest may devolve.

"Parties under whom they or any of them claim" comprise two classes of persons:

- (i) Parties actually present in the former suit;
- (ii) Parties claiming under the parties to the suit (privies); and
- (iii) Persons represented by a party in the former suit (Explanation VI).

*Illustration*

A sues B for a declaration of title to the property and obtains a decree. Thereafter A sues C for possession of that property. C contends that B is the owner and that he is in possession as B's tenant. The defence is barred inasmuch as C claims through B

(xi) *Representative suit: Explanation VI*<sup>136</sup>

Explanation VI to Section 11 deals with representative suits, i.e., suits instituted by or against a person in his representative, as distinguished from individual capacity. This Explanation provides that where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, and all persons interested in such right shall, for the purposes of Section 11, be deemed to claim under the persons so litigating.<sup>137</sup> Explanation VI, thus illustrates one aspect of constructive *res judicata*. Thus, where a representative suit is brought under Section 92 of the Code and a decree is passed in such a suit, law assumes that all persons who have the same interest as the plaintiffs in the representative suit were represented by the said plaintiffs and, therefore, are constructively barred by *res judicata* from re-agitating the matters directly and substantially in issue in the former suit.

135. *Gunjeshwar Kunwar v. Durga Prashad*, AIR 1917 PC 146; *M.K. Muhamed Pillai v. Pariyathu Pillai*, AIR 1956 TC 27 (FB); *Kamakshya Narain v. Baldeo Sahai*, AIR 1950 Pat 97 (FB); *Rattan Chand v. Ram Kishan Murari*, AIR 1928 All 447; *Narayanan Nambooripad v. Gopalan Nair*, AIR 1960 Ker 367.

136. For detailed discussion of representative suits, see *infra*, Chap. 5.

137. *Ahmad Adam Sait v. M E Makhri*, AIR 1964 SC 107 at pp. 113-14. (1964) 2 SCR 647; see also *Raje Anandrao v. Shamrao*, AIR 1961 SC 1206 at p. 1211. (1961) 3 SCR 930 at p. 940.

The underlying principle is that if the very issue is litigated in the former suit and is decided, there is no good reason why the others making the same claim cannot be held to be claiming a right "in common for themselves and others" under Explanation VI. If that view is not taken, it would necessarily mean that there would be two inconsistent decrees and one of the tests in deciding whether the doctrine of *res judicata* applies to a particular case or not is to determine whether two inconsistent decrees will come into existence if it is not applied.<sup>138</sup>

### (xii) Conditions

The following conditions must be satisfied before a decision may operate as *res judicata* under Explanation VI:

- (i) There must be a right claimed by one or more persons in common for themselves and others not expressly named in the suit;
- (ii) the parties not expressly named in the suit must be interested in such right;
- (iii) the litigation must have been conducted *bona fide* and on behalf of all parties interested; and
- (iv) if the suit is under Order 1 Rule 8, all conditions laid down therein must have been strictly complied with.

It is only when the above conditions are satisfied that a decision may operate as *res judicata* in the subsequent suit.<sup>139</sup> Thus, where a party claims a right for himself alone which happens to be common to him and others, it cannot be said that he was litigating on behalf of others and Explanation VI does not apply.<sup>140</sup> Similarly, if the earlier proceeding was not a *bona fide* public interest litigation, the subsequent proceeding would not be barred. *The possibility of litigation to foreclose any further inquiry into a matter in which an enquiry is necessary in the interest of public cannot be overlooked.*<sup>141</sup> (emphasis supplied)

### (xiii) Public interest litigation

If the object of Explanation VI of Section 11 is considered, there is no good reason why it cannot apply to a *bona fide* public interest litigation. If the previous litigation was a *bona fide* public interest litigation

138. *Narayana Prabhu Venkateswara Prabhu v. Narayana Prabhu Krishna Prabhu*, (1977) 2 SCC 181 at pp 188-89 AIR 1977 SC 1268 at p 1274

139. *Forward Construction Co v Prabhat Mandal (Regd)*, (1986) 1 SCC 100 AIR 1986 SC 391

140. *Sadagopa Chariar v Krishnamoorthy Rao* ILR (1907) 30 Mad 185 at p 190 (PC)

141. *Forward Construction Co case*, (1986) 1 SCC 100, at pp 112-13 (SCC) at p 398 (AIR) For "Public Interest Litigation" see Authors *Lectures on Administrative Law* (2012) Lecture 9 Authors *Administrative Law* (2012) Chap 13

in respect of a right which was common and was agitated in common with others, the decision in previous litigation would operate as *res judicata* in a subsequent litigation. But if the earlier proceeding was not a *bona fide* public interest litigation, the subsequent proceeding would not be barred.<sup>142</sup>

### III. Same title

#### (i) General

The third condition of *res judicata* is that the parties to the subsequent suit must have litigated under the same title as in the former suit.

#### (ii) Meaning

Same title means same capacity.<sup>143</sup> Title refers to the capacity or interest of a party, that is to say, whether he sues or is sued for himself in his own interest or for himself as representing the interest of another or as representing the interest of others along with himself and it has nothing to do with the particular cause of action on which he sues or is sued. Litigating under the same title means that the demand should be of the same quality in the second suit as was in the first suit. It has nothing to do with the cause of action on which he sues or is sued.

#### (iii) Illustrations

1. A sues B for title to the property as an heir of C under the customary law. The suit is dismissed. The subsequent suit for title to the property as an heir of C under the personal law is barred.
2. A sues B for possession of property as an owner basing his claim on title. The suit is dismissed. A subsequent suit for possession of property on the ground of adverse possession is barred.
3. A sues B for possession of property as an owner basing his claim on title. The suit is dismissed. A subsequent suit by A against B for possession of the same property as mortgagor is not barred.
4. A sues for possession of math property as an heir of Mahant. The suit is dismissed. A subsequent suit by A against B as the manager of the math is not barred.

142. For detailed discussion of "Public Interest Litigation", see, V.G. Ramachandran, *Law of Writs* (2006) Vol. I, Pt. II, Chap. 13; Authors' *Administrative Law* (2012) Chap. 13, Authors' *Lectures on Administrative Law* (2012) Lecture 9.

143. *Per Broomfield, J. in Mahadevappa Somappa v. Dharmappa Sanna*, AIR 1942 Bom 322 at p. 326; 44 Bom LR 710.

**(iv) Test**

The test for *res judicata* is the identity of title in the two litigations and not the identity of the subject-matter involved in the two cases.<sup>144</sup> The crucial test for determining whether the parties are litigating in a suit under the same title as in the previous suit is of the capacity in which they sued or were sued. The term "same title" has nothing to do either with the cause of action or with the subject-matter of two suits. Where the right claimed in both the suits is the same, the subsequent suit will be barred even though the right in the subsequent suit is sought to be established on a ground different from the one in the former suit.<sup>145</sup>

**IV. Competent court****(i) General**

The fourth condition of *res judicata* is that the court which decided the former suit must have been a court competent to try the subsequent suit.<sup>146</sup> Thus, the decision in a previous suit by a court, not competent to try the subsequent suit, will not operate as *res judicata*.<sup>147</sup>

**(ii) Object**

The principle behind this condition is sound one, namely, that the decision of the court of limited jurisdiction ought not to be final and binding on a court of unlimited jurisdiction.<sup>148</sup>

**(iii) Competent court: Meaning: Explanation VIII**

The expression "competent to try" means "competent to try the subsequent suit if brought at the time the first suit was brought".<sup>149</sup> In other words, the relevant point of time for deciding the question of competence of the court is the date when the former suit was brought and not the date when the subsequent suit was filed.<sup>150</sup>

144. *Ram Gobinda v. Bhaktabala*, (1971) 1 SCC 387 at p. 394; AIR 1971 SC 664 at p. 670, *Kushal Pal v. Mohan Lal*, (1976) 1 SCC 449 at pp. 456-57; AIR 1976 SC 688 at p. 693.

145. *Sunderabai v. Devaji Shankar Deshpande*, AIR 1954 SC 82 at p. 84, *Union of India v. Pramod Gupta*, (2005) 12 SCC 1.

146. *Raj Lakshmi v. Banamali Sen*, AIR 1953 SC 33 at p. 40; 1953 SCR 154, *Jeevantha v. Hanumantha*, AIR 1954 SC 9 at p. 10, *Sheodan Singh v. Daryao Kunwar*, AIR 1966 SC 1332 at p. 1335 (1966) 3 SCR 300.

147. *Pandurang Mahadeo v. Annaji Balwant* (1971) 3 SCC 530; AIR 1971 SC 2228; Chief Justice of A.P. v. L.V.A. Dixitulu, (1979) 2 SCC 34 at p. 42; AIR 1979 SC 193 at p. 198; *Raj Lakshmi v. Banamali Sen*, AIR 1953 SC 33; 1953 SCR 154.

148. Law Commission's Fifty-fourth Report at p. 21.

149. *Devendra Kumar v. Pramuda Kanta*, AIR 1933 Cal 879 (1933) 37 CWN 810.

150. *Jeevantha v. Hanumantha*, AIR 1954 SC 9; *Pandurang Mahadeo v. Annaji Balwant* (1971) 3 SCC 530; AIR 1971 SC 2228, *Sheodan Singh v. Daryao Kunwar*, AIR 1966 SC 1332.

*(iv) Types of courts*

In order that a decision in a former suit may operate as *res judicata*, the court which decided that suit must have been either:

- (a) a court of exclusive jurisdiction; or
- (b) a court of limited jurisdiction; or
- (c) a court of concurrent jurisdiction.

*(A) Court of exclusive jurisdiction*

A plea of *res judicata* can successfully be taken in respect of judgments of courts of exclusive jurisdiction, like Revenue Courts, Land Acquisition Courts, Administration Courts, etc. If a matter directly and substantially in issue in a former suit has been adjudicated upon by a court of exclusive jurisdiction, such adjudication will bar the trial of the same matter in a subsequent suit in an ordinary civil court.<sup>151</sup>

*(B) Court of limited jurisdiction*

A decision on an issue heard and finally decided by a court of limited jurisdiction will also operate as *res judicata* in a subsequent suit irrespective of the fact that such court of limited jurisdiction was not competent to try the subsequent suit.<sup>152</sup>

The expression "court of limited jurisdiction" has been interpreted differently by different High Courts. In *Nabin Majhi v. Tela Majhi*<sup>153</sup>, the High Court of Calcutta held that courts of limited jurisdiction are courts other than ordinary civil courts, such as Revenue Courts, Land Acquisition Courts, Insolvency Courts, etc. A court of limited pecuniary jurisdiction cannot be said to be a court of limited jurisdiction. Reading Explanation VIII along with Section 11, it is clear that if the former court is unable to try the subsequent suit as beyond its pecuniary jurisdiction, the decision of the former court will not operate as *res judicata* in the subsequent suit.

On the other hand, in *P.V.N. Devoki Amma v. P.V.N. Kunhi Raman*<sup>154</sup>, the High Court of Kerala did not agree with the Calcutta view in *Nabin Majhi case*<sup>155</sup> and observed that the term "a court of limited jurisdiction"

(1966) 3 SCR 300

151. *Raj Lakshmi v. Banamali Sen*, AIR 1953 SC 33 at p. 40; 1953 SCR 154, *Bhagwan Dayal v. Reoti Devi*, AIR 1962 SC 287 at pp. 293-94; (1962) 3 SCR 440.

152. *P.V.N. Devoki Amma v. P.V.N. Kunhi Raman*, AIR 1980 Ker 230; *Biro v. Banta Singh*, AIR 1980 Punj 164.

153. AIR 1978 Cal 440. 82 CWN 1097; (1978) 2 Cal LJ 150; see also *Promode Ranjan v. Nirapada Mondal*, AIR 1980 Cal 181. 82 CWN 1097.

154. AIR 1980 Ker 230 (233). 1980 Ker LT 690

155. AIR 1978 Cal 440. 82 CWN 1097; (1978) 2 CLJ 150.

is wide enough to include a court whose jurisdiction is subject to a pecuniary jurisdiction and it will not be right to interpret the said expression as connoting only courts other than ordinary civil courts. *Such a narrow and restricted interpretation is not warranted by the words used by Parliament.* (emphasis supplied)

It is submitted that the view taken by the High Court of Kerala in *Devoki Amma*<sup>156</sup> is correct and preferable to the one taken by the High Court of Calcutta in *Nabin Majhi*<sup>157</sup>. The point is, however, concluded by a decision of the Supreme Court in *Sulochana Amma v. Narayanan Nair*<sup>158</sup>.

### (C) Court of concurrent jurisdiction

Where the court which decided the former suit was a court of concurrent jurisdiction having competence to try the subsequent suit, the decision given by it would operate as *res judicata* in a subsequent suit.<sup>159</sup> Concurrent jurisdiction means concurrent as regards the pecuniary limit as well as the subject-matter of the suit. "Competency" in Section 11 has no reference to territorial jurisdiction of the court.<sup>160</sup>

As seen above, the ambit and scope of Explanation VIII has been interpreted differently by different High Courts. In *Nabin Majhi v. Tela Majhi*<sup>161</sup>, it was contended that a court of Munsif by reason of its limited pecuniary jurisdiction can be said to be a court of limited jurisdiction and hence, its decision would operate as *res judicata* in a subsequent suit instituted in the court of a subordinate judge.

Negating the contention and interpreting Explanation VIII in the light of the substantive provision (Section 11), the Court observed:

"[O]ne of the conditions for the applicability of Section 11 is that the Court in which the former suit was instituted must be competent to try the subsequent suit. If the former Court is unable to try the subsequent suit as it is beyond its pecuniary jurisdiction, the decision of the former court will not be *res judicata* in the subsequent suit. If the legislature had really intended to remove the condition relating to the competency of the former Court, in that case it would have removed the same from the section itself. In the face of the provision of Section 11, retaining the said condition for the applicability of *res judicata*, that the former Court must be competent to try the subsequent suit, it is difficult for us to accept the interpretation of Explanation VIII as suggested on behalf of the appellant"<sup>162</sup> (emphasis supplied)

156. AIR 1980 Ker 230 1980 Ker LT 690.

157. AIR 1978 Cal 440 82 CWN 1097 (1978) 2 CLJ 150.

158. (1994) 2 SCC 14 AIR 1994 SC 152.

159. *Pandurang Mahadeo v. Annaji Bahwant*, (1971) 3 SCC 530 AIR 1971 SC 2228.

160. *Maqbul v. Amir Hasan*, AIR 1916 PC 136.

161. AIR 1978 Cal 440 82 CWN 1097 (1978) 2 CLJ 150.

162. *Ibid.*, at p. 442 (AIR).

The High Court of Kerala, however, took a contrary view in *P.V.N. Devoki Amma v. P.V.N. Kunhi Raman*<sup>163</sup>. Disagreeing with the ratio laid down in *Nabin Majhi* and keeping in mind the object of enacting Explanation VIII, the Court concluded:

"In our opinion, the expression 'a Court of limited jurisdiction' is wide enough to include a Court whose jurisdiction is subject to a pecuniary limitation and it will not be right to interpret the said expression as connoting only Courts other than ordinary civil courts. Such a narrow and restricted interpretation is not warranted by the words used by Parliament. The Statement of Objects and Reasons for the Bill which was subsequently enacted as Amending Act 104 of 1976 and the report of the Joint Select Committee, which effected some substantial changes in the Bill as originally drafted, make it abundantly clear that the intention underlying the introduction of Explanation VIII was that the decisions of the Courts of limited jurisdiction should operate as *res judicata* in a subsequent suit although the Court of limited jurisdiction may not be competent to try such subsequent suit . . . . "In our opinion the object and purpose underlying the introduction of Explanation VIII was much wider, namely, to render the principle of *res judicata* fully effective so that issues heard and finally decided between the parties to an action by any Court competent to decide such issues should not be allowed to be reagitated by such parties or persons claiming through them in a subsequent litigation."<sup>164</sup> (emphasis supplied)

It is submitted that the above observations in *Devoki Amma* lay down the correct proposition of law. The underlying object of the amendment and insertion of Explanation VIII is to avoid multiplicity of suits. It is, no doubt, true that Parliament has not deleted from Section 11 the words "in a court competent to try such subsequent suit or the suit in which such issue has subsequently been raised", but the section and the explanation must be read harmoniously. If it is not so read, the primary object of enacting Explanation VIII would be defeated, inasmuch as a party by adding some property or increasing the value thereof from time to time may go on instituting suits after suits, deliberately and successfully avoiding the decision against him to operate as *res judicata*. It would encourage endless litigation.

It is further submitted that it would have been better had Parliament, in view of insertion of Explanation VIII by the Amendment Act of 1976, deleted the words "a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised". But it is settled law that an explanation to a section in a given case, instead of serving the traditional purpose of explaining a section, may work as an independent provision. Ultimately it is the intention of the legislature which is paramount and the mere use of a label cannot control or deflect such intention.

163. AIR 1980 Ker 230: 1980 Ker LT 690.

164. AIR 1980 Ker 230 at p. 233. 1980 Ker LT 690.

Moreover, such a construction would result in an anomalous situation. If a matter is decided by a court of limited jurisdiction, Explanation VIII would apply and such decision would operate as *res judicata* in a subsequent suit. But if it is decided by a court of limited pecuniary jurisdiction, the decision would not attract Section 11. This is really absurd. Further, such an interpretation would be against the basic principle underlying the doctrine of *res judicata* which is reflected in the well-known maxim that "larger public interest requires that all litigation must, sooner than later, come to an end".

Finally, it may result in conflicting decisions by the same officer. For instance, a decree passed by a Rent Controller will operate as *res judicata* but a decree passed by a Civil judge or a Munsif will not be barred by that doctrine though the same officer might have decided both the cases.

A special reference may be made to a decision of the Supreme Court in *Sulochana Amma v. Narayanan Nair*<sup>165</sup>. In that case, A by a deed of settlement gave life estate to B, and the remainder to C. After the death of A, B alienated the property to D. C filed a suit against B in the Munsif's court restraining B from alienating the property and committing acts of waste. During the pendency of the suit, D sold the property to E. C's suit against B was decreed and it was held that B had no right to alienate property and permanent injunction was also granted. B's appeal was also dismissed. D, who was not a party to the earlier suit was committing acts of waste. C, therefore, filed another suit against B and D for permanent injunction. That suit was also decreed. But the question of D's title was left open. C filed a third suit against E in the court of the Subordinate judge for declaration of his title which was decreed. It was confirmed up to the High Court. E approached the Supreme Court.

Considering the purpose of the amendment and insertion of Explanation VIII, the Supreme Court stated, "No doubt main body of Section 11 was not amended, yet the expression 'the court of limited jurisdiction' in Explanation VIII is wide enough to include a court whose jurisdiction is subject to pecuniary limitation and other cognate expressions analogous thereto. Therefore, Section 11 is to be read in combination and harmony with Explanation VIII. The result that would flow is that an order or an issue which had arisen directly and substantially between the parties or their privies and decided finally by a competent court or tribunal, though of limited special jurisdiction, which includes pecuniary jurisdiction, will operate as *res judicata* in a subsequent suit or proceeding, notwithstanding the fact that such court of limited or special jurisdiction was not a competent court to try the subsequent suit . . . . The technical aspect, for instance, pecuniary or subject-wise

competence of the earlier forum to adjudicate the subject-matter or to grant reliefs sought in the subsequent litigation, should be immaterial when the general doctrine of *res judicata* is to be invoked. *Explanation VIII, inserted by the Amending Act of 1976, was intended to serve this purpose and to clarify this purpose and to clarify this position.*"<sup>166</sup>

(emphasis supplied)

Overruling the "very narrow view" of the High Court of Calcutta<sup>167</sup> and approving the "broader view" of the High Courts of Kerala,<sup>168</sup> Orissa<sup>169</sup> and Madras,<sup>170</sup> the Court went on to observe:

"[I]f the scope of Explanation VIII is confined to the order and decree of an insolvency court, the scope of enlarging Explanation VIII would be defeated and the decree of civil courts of limited pecuniary jurisdiction shall stand excluded, while that of the former would be attracted. Such an anomalous situation must be avoided. The Tribunal whose decisions were not operating as *res judicata*, would be brought within the ambit of Section 11, while the decree of the civil court of limited pecuniary jurisdiction which is accustomed to the doctrine of *res judicata*, shall stand excluded from its operation. Take for instance, now the decree of a Rent Controller shall operate as *res judicata*, but a decree of a District Munsif (Civil judge), Junior Division, according to the stand of the appellant, will not operate as *res judicata*, though the same officer might have decided both the cases. To keep the litigation unending, successive suits could be filed in the first instance in the court of limited pecuniary jurisdiction and later in a court of higher jurisdiction, and the same issue shall be subject of trial again, leading to conflict of decisions. It is obvious from the objects underlying Explanation VIII, that by operation of the non-obstante clause finality is attached to a decree of civil court of limited pecuniary jurisdiction also to put an end to the vexatious litigation and to conclusiveness to the issue tried by a competent court, when the same issue is directly and substantially in issue in a later suit between the same parties or their privies by operation of Section 11. The parties are precluded from raising once over the same issue for trial."<sup>171</sup> (emphasis supplied)

In *Church of South India Trust Assn. v. Telugu Church Council*<sup>172</sup>, it was contended that lack of territorial jurisdiction goes to the root of the competence of a court trying a suit and a decision rendered by a court lacking territorial jurisdiction would not operate as *res judicata* in a subsequent suit.

Negating the contention and referring to leading decisions on the point, the Supreme Court stated, "We are, therefore, of the opinion that

166. *Sulochana Amma v. Narayanan Nair*, (1994) 2 SCC 14: AIR 1994 SC 152 at pp. 155-56.

167. *Nabin Majhi v. Tela Majhi*, AIR 1978 Cal 440, *Promode Ranjan v. Nirapada Mondal*, AIR 1980 Cal 181. 82 CWN 1097.

168. *P.V.N. Devaki Amma v. P.V.N. Kunhi Raman*, AIR 1980 Ker 230.

169. *Kumarmonisa v. Himachal Sahu*, AIR 1981 Ori 177.

170. *C. Arumugathan v. S. Muthusami*, (1991) 2 MLJ 538.

171. *Sulochana Amma v. Narayanan Nair*, (1994) 2 SCC 14. AIR 1994 SC 152 at p. 156.

172. (1996) 2 SCC 520: AIR 1996 SC 987.

Section 11 of the present Code (excluding Explanation VIII) envisages that the judgment in a former suit would operate as a *res judicata*, if the court which decided the said suit was competent to try the same by virtue of its pecuniary jurisdiction and the subject-matter to try the subsequent suit and that it is not necessary that the said court should have had territorial jurisdiction to decide the subsequent suit."<sup>173</sup>

**(v) Test**

The test in such case is whether the second suit could have been decided by the first court? If the answer to the question is in affirmative, the decision will operate as *res judicata*. But if the reply is in the negative, *res judicata* has no application.

**(vi) Right of appeal: Explanation II**

(A) *Position prior to Explanation II.*—Under the Code of 1882, it was held by the High Courts of Bombay, Madras and Punjab that a prior decision in which no second appeal lay, such as suits of a nature cognizable by a Court of Small Causes when the amount of subject-matter does not exceed five hundred rupees, could not operate as *res judicata* in a subsequent suit in which such appeal was maintainable. The High Court of Calcutta, on the other hand, had taken a contrary view and held that such decision would operate as *res judicata*, notwithstanding that no second appeal was allowed by law in the former suit. Explanation II as inserted in the present Code affirms the Calcutta view and clarifies that the competence of a court does not depend on the right of appeal from a decision from such Court.<sup>174</sup> The fact that no second appeal lay in the previous suit is no longer a valid ground for holding that the decision in the previous suit would not operate as *res judicata*.

(B) *Position after Explanation II.*—Explanation II to Section 11 makes it clear that for the purpose of *res judicata*, the competence of the court shall be determined irrespective of any provision as to a right of appeal from the decision of such court. No doubt, one of the tests for application of the doctrine of *res judicata* is to ascertain whether a party aggrieved could challenge the finding by filing an appeal. But the question whether there is a bar of *res judicata* does not depend on the existence of a right of appeal but on the question whether the same issue, under the circumstances mentioned in Section 11 of the Code,

<sup>173</sup> *Ibid* at p 535 (SCC) 995 (AIR)

<sup>174</sup> *Narayan Prabhu Venkateswara v Narayana Prabhu Krishna* (1977) 2 SCC 181 AIR 1977 SC 1268, *Lonankutty v Thomman*, (1976) 3 SCC 528 AIR 1976 SC 1645

has been heard and finally decided.<sup>175</sup> Though the Law Commission recommended to confer a right of appeal to a successful party against whom a finding has been recorded, the recommendation has not been accepted and a party cannot file an appeal against a finding recorded against him by a court if the decree is in his favour.<sup>176</sup>

## V. Heard and finally decided

### (i) General

The fifth and the final condition of *res judicata* is that the matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by a court in the former suit.<sup>177</sup> In the words of Lord Romilly<sup>178</sup>, "*Res judicata* by its very words means a matter upon which the court has exercised its judicial mind and has come to the conclusion that one side is right and has pronounced a decision accordingly."

The section requires that there should be a final decision on which the court must have exercised its judicial mind.<sup>179</sup> In other words, the expression "heard and finally decided" means a matter on which the court has exercised its judicial mind and has after argument and consideration come to a decision on a contested matter. *It is essential that it should have been heard and finally decided.*<sup>180</sup> (emphasis supplied)

### (ii) Nature and scope

A matter can be said to have been heard and finally decided notwithstanding that the former suit was disposed of (i) *ex parte*; or (ii) by failure to produce evidence (Order 17 Rule 3); or (iii) by a decree on an award; or (iv) by oath tendered under the Indian Oaths Act, 1873. But if the suit is dismissed on a technical ground, such as non-joinder of necessary party, it would not operate as *res judicata*.<sup>181</sup>

175. *Ramesh Chandra v. Shiv Charan Dass*, 1990 Supp SCC 633 at p. 635; AIR 1991 SC 264 at p. 265; *Premier Tyres Ltd v Kerala SRTC*, 1993 Supp (2) SCC 146.

176. Law Commission's Fifty-fourth Report, at pp. 26-27.

177. *Kewal Singh v. Lajwanti*, (1980) 1 SCC 290 at p. 296. AIR 1980 SC 161 at p. 164; *Ram Gobinda v. Bhaktabala*, (1971) 1 SCC 387 at p. 395. AIR 1971 SC 664 at p. 671, *Kushal Pal v. Mohan Lal*, (1976) 1 SCC 449 at p. 456-57. AIR 1976 SC 688 at p. 693; *Narayan Prabhu case*, (1977) 2 SCC 181; *Gurbax Rai v. Punjab National Bank*, (1984) 3 SCC 96. AIR 1984 SC 1012 at p. 1014; *Ferro Alloys Co. Ltd. v. Union of India*, (1999) 4 SCC 149 at p. 161; AIR 1999 SC 1236 at p. 1243.

178. *Jenkins v. Robertson*, (1867) LR 1 Sc & Div 117, HL.

179. *Pandurang Ramchandra v. Shantibai Ramchandra*, 1989 Supp (2) SCC 627 at p. 640; AIR 1989 SC 2240 at p. 2249.

180. *Kushal Pal v. Mohan Lal*, (1976) 1 SCC 449 at pp. 456-57. AIR 1976 SC 688 at p. 693.

181. *State of Maharashtra v. National Construction Co.*, (1996) 1 SCC 735; AIR 1996 SC 2367

*(iii) Decision on merits*

In order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been on merits.<sup>182</sup> Thus, if the former suit was dismissed by a court for want of jurisdiction, or for default of plaintiff's appearance, or on the ground of non-joinder or misjoinder of parties, or on the ground that the suit was not properly framed, or that it was premature, or that there was a technical defect, the decision not being on merits, would not operate as *res judicata* in a subsequent suit.<sup>183</sup>

*Illustration*

A, a partnership firm, filed a suit against B to recover Rs 50,000. The suit was dismissed on the ground that it was not maintainable since the partnership firm was not registered as required by the provisions of the Indian Partnership Act, 1932. Thereafter, the firm was registered and the subsequent suit was filed on the same cause of action. The suit is not barred by *res judicata*.

*(iv) Necessity of decision*

In order to operate as *res judicata*, a finding of a court must have been necessary for the determination of a suit. If a finding is not necessary, it will not operate as *res judicata*. "It is fairly settled that the finding on an issue in the earlier suit to operate as *res judicata* should not have been only directly and substantially in issue but it should have been necessary to be decided as well."<sup>184</sup> What operates as *res judicata* is the *ratio* of what is fundamental to the decision. It cannot, however, be ramified or expanded by logical extension.<sup>185</sup> And a finding on an issue cannot be said to be necessary to the decision of a suit unless the decision was based upon such finding.<sup>186</sup> Again, a decision cannot be said to have been based upon a finding unless an appeal can lie against such finding. The underlying principle is that "everything that should have the

182. *Sheodan Singh v. Daryao Kunwar*, AIR 1966 SC 1332 at p. 1336. (1966) 3 SCR 300. *Tilokchand H.B. Motichand v. H.B. Munshi*, (1969) 1 SCC 110 at p. 121 AIR 1970 SC 898 at p. 906 (per Bachawat, J)

183. *Shivashankar Prasad v. Baikunth Nath*, (1969) 1 SCC 718 at p. 721 AIR 1969 SC 971 at pp. 973-74, *Pujari Bai v. Madan Gopal*, (1989) 3 SCC 433 AIR 1989 SC 1764 at pp. 768-69, *Pandurang Ramchandra v. Shantibai Ramchandra*, 1989 Supp (2) SCC 627, *Krishan Lal v. State of J&K*, (1994) 4 SCC 422, *State of Maharashtra v. National Construction Co.*, (1996) 1 SCC 735.

184. *Most Rev. P.M.A. Metropolitan v. Moran Mar Marthoma*, 1995 Supp (4) SCC 286 at p. 336 AIR 1995 SC 2001 at p. 2034

185. *Pandurang Ramchandra v. Shantibai Ramchandra*, 1989 Supp (2) SCC 627 at p. 640 AIR 1989 SC 2240 at p. 2249, *Ramesh Chandra v. Shiv Charan Dass*, 1990 Supp SCC 633 at p. 635 AIR 1991 SC 264 at p. 265

186. *Ganga Bai v. Vijay Kumar* (1974) 2 SCC 393 AIR 1974 SC 1126, *Shankarlal v. Hiralal*, AIR 1950 PC 80, *Hayatuddin v. Abdul Gani*, AIR 1976 Bom 23 at p. 25

authority of *res judicata* is, and ought to be, subject to appeal, and reciprocally an appeal is not admissible on any point not having the authority of *res judicata*".<sup>187</sup> It is the right of appeal which indicates whether the finding was necessary or merely incidental.<sup>188</sup>

#### (v) *Finding on more than one issue*

When a finding is recorded by a court on more than one issue, the legal position is as under:

(A) *When suit is dismissed.*—If the plaintiff's suit is wholly dismissed, no issue decided against the defendant can operate as *res judicata* against him in a subsequent suit, for he cannot appeal from a finding on any such issue, the decree being wholly in his favour. But every issue decided against the plaintiff may operate as *res judicata* against him in a subsequent suit, for he can appeal from a finding on such issue, the decree being against him.

(B) *When suit is decreed.*—If the plaintiff's suit is wholly decreed, no issue decided against him can operate as *res judicata* for he cannot appeal from a finding on any such issue, the decree being wholly in his favour. But every issue decided against the defendant is *res judicata* for he can appeal from a finding on such issue, the decree being against him.

(C) *Appeal against finding.*—No appeal lies against a mere finding, for the simple reason that the Code does not provide for filing of any such appeal.<sup>189</sup> It may, however, be stated that a person aggrieved by a finding in the judgment may file cross-objections, even though the decree might have been passed in his favour.<sup>190</sup>

#### (vi) *Right of appeal*

A decision cannot be said to have been based upon a finding unless an appeal lies against such finding. As a general rule, "everything that should have authority of *res judicata* is, and ought to be, subject to appeal, and reciprocally, an appeal is not competent on any point not having the authority of *res judicata*".<sup>191</sup> It is the right of appeal which indicates whether the finding was necessary or merely incidental.<sup>192</sup> The position is, however, substantially changed by the Amendment Act of 1976.

187. *Narain Das v. Faiz Shah*, (1889) PR No. 157 (FB).

188. This position is also, now, substantially changed by the Amendment Act of 1976. See, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. I at pp. 204-05, 218-19.

189. *Ganga Bai v. Vijay Kumar*, (1974) 2 SCC 393. AIR 1974 SC 1126.

190. Expln. to Or. 41 R. 22.

191. *Sobhag Singh v. Jai Singh*, AIR 1968 SC 1328 at p 1332. (1968) 3 SCR 848, *Tara Singh v. Shakuntala*, AIR 1974 Raj 21.

192. For detailed discussion, see *supra*, "Condition IV".

**(vii) Relief claimed but not granted: Explanation V**

Explanation V to Section 11 provides that if a relief is claimed in a suit, but is not expressly granted in the decree, it will be deemed to have been refused and the matter in respect of which the relief is claimed will be *res judicata*.<sup>193</sup> But this explanation applies only when the relief claimed is (i) substantial relief; and (ii) the court is bound to grant it.

**(22) Execution proceedings: Explanation VII**

Prior to the addition of Explanation VII to Section 11 by the Amendment Act of 1976 in the Code of Civil Procedure, 1908, the provisions thereof did not, in terms apply to execution proceedings, but the general principles of *res judicata* were held to be applicable even to execution proceedings.<sup>194</sup>

Section 11 has now been amended by Act 104 of 1976. Explanation VII specifically provides that the provisions of Section 11 will directly apply to execution proceedings also.

**(23) Industrial adjudication**

Though Section 11 of the Code speaks about civil suits only, the general principles underlying the doctrine of *res judicata* apply even to an industrial adjudication.<sup>195</sup> Thus, an award pronounced by the Industrial Tribunal operates as *res judicata* between the same parties and the Payment of Wages Authority has no jurisdiction to entertain the said claim again. Similarly, if in an earlier case, the Labour Court had decided that A was not a "workman" under the Industrial Disputes Act, 1947, the said finding operates as *res judicata* in subsequent proceedings also. And there are good reasons why this principle should be extended and applied to industrial adjudication also. Legislation regulating the

193. *Mysore SRTC v. Babajan Conductor*, (1977) 2 SCC 355 at p. 360. AIR 1977 SC 1112 at p. 1116.

194. *Mohanlal Goenka v. Benoy Krishna*, AIR 1953 SC 65 at pp. 72-73; 1953 SCR 377. *Jai Narain v. Kedar Nath*, AIR 1956 SC 359. 1956 SCR 62. *Maqbool Alam v. Khodaya*, AIR 1966 SC 1194 (1966) 3 SCR 479. *Kani Ram v. Kazani*, (1972) 2 SCC 192. AIR 1972 SC 1427. *Prem Lata v. Lakshman Prasad*, (1970) 3 SCC 440. AIR 1970 SC 1525.

195. *Burn & Co. v. Employees*, AIR 1957 SC 38 at p. 43. 1956 SCR 781; *Bombay Gas Co. Ltd. v. Shridhar Bhau Parab*, AIR 1961 SC 1196 at p. 1197-98 (1961) 2 LLJ 629. *Bombay Gas Co. Ltd. v. Jagannath Pandurang*, (1975) 4 SCC 690. *Punjab Coop. Bank Ltd. v. R. S. Bhatia*, (1975) 4 SCC 696 at p. 698. AIR 1975 SC 1898 at p. 1899. *Workmen v. Straw Board Mfg. Co. Ltd.*, (1974) 4 SCC 681 at pp. 692-93. AIR 1974 SC 1132 at p. 1140-41. *Workmen v. Hindustan Lever Ltd.*, (1984) 1 SCC 728 at p. 744-48. AIR 1984 SC 516 at p. 526-28. *Bharat Barrel & Drum Mfg. Co. (P) Ltd. v. Employees Union*, (1987) 2 SCC 591. AIR 1987 SC 1415. *Ghanshyam Jaiswal Dr. v. Kamal Singh*, (1996) 3 SCC 54. *Singhai Lal Chand v. Rashtriya Swayamsewak Sangh* (1996) 3 SCC 149. AIR 1996 SC 1211. *Pondicherry Khadi & Village Industries Board v. P. Kulothangan*, (2004) 1 SCC 68. AIR 2003 SC 4701.

relation between capital and labour has two objects in view. It seeks to ensure to the workmen, who have not the capacity to combat capital on equal terms, fair returns for their labour. It also seeks to prevent disputes between employers and employees, so that production might not be adversely affected and the larger interests of society might not suffer. Thus, where an award was passed in earlier proceedings, it was held that the said award was binding on the parties and the subsequent proceedings initiated by the employees were barred.

In *Bombay Gas Co. Ltd. v. Jagannath Pandurang*<sup>196</sup>, the Supreme Court observed:

"The doctrine of *res judicata* is wholesome one which is applicable not merely to matters governed by the provisions of the Code of Civil Procedure but to all litigations. It proceeds on the principle that there should be no unnecessary litigation and whatever claims and defences are open to parties should all be put forward at the same time provided no confusion is likely to arise by so putting forward all such claims."<sup>197</sup> (emphasis supplied)

In other words, the principle underlying Section 11, expressed in the maxim "*interest reipublicae ut sit finis litium*" (it is in the interest of the State that there should be an end to litigation) is founded on sound public policy and is of universal application, otherwise great injustice might be done under colour and pretence of law.<sup>198</sup> The rule of *res judicata* is dictated by a wisdom which is for all times.<sup>199</sup>

However, the technical rule of *res judicata* cannot apply to industrial adjudication, since it is meant and suited for ordinary civil litigation.<sup>200</sup> Principles analogous to *res judicata* can be availed of to scuttle any attempt at raising industrial disputes repeatedly in defiance of operative settlements and awards. But this highly-technical concept of civil justice must be kept within precise, confined limits in the field of industrial adjudication which must as far as possible be kept free from such technicalities which thwart resolution of industrial disputes. Therefore,

196. (1975) 4 SCC 690; (1975) 2 LLJ 345.

197. *Ibid.* at pp. 695-96 (SCC)

198. *Per* Lord Coke, quoted in *Sheoparsan Singh v. Ramnandan Singh*, (1915-16) 43 IA 91: AIR 1916 PC 78.

199. *Per* Jenkins, C.J. in *Sheoparsan Singh v. Ramnandan Singh*, (1915-16) 43 IA 91: AIR 1916 PC 78.

200. *Guest, Keen, Williams (P) Ltd. v. P.J. Sterling*, AIR 1959 SC 1279 at p. 1284; (1960) 1 SCR 348; *India General Navigation and Railway Co. Ltd. v. Workmen*, AIR 1960 SC 1286 at p. 1287; (1960) 1 LLJ 561; *Workmen v. Balmer Lawrie & Co. Ltd.*, AIR 1964 SC 728 at p. 731; (1964) 5 SCR 344; *Staff Union v. Associated Cement Co. Ltd.*, AIR 1964 SC 914 at p. 917; (1964) 1 LLJ 12; *Shahadara (Delhi) Saharanpur Light Rly. Co. Ltd. v. S S Rly. Workers' Union*, AIR 1969 SC 513 at pp. 521-22; (1969) 2 SCR 131; *Agra Electric Supply Co. Ltd. v. Alladdin*, (1969) 2 SCC 598 at pp. 605-06; AIR 1970 SC 512 at pp. 517-18; *Mumbai Kamgar Sabha v. Abdulhai*, (1976) 3 SCC 832 at pp. 851-52; AIR 1976 SC 1455 at pp. 1469-70; *Workmen v. Hindustan Lever Ltd.*, (1984) 1 SCC 728 at pp. 744-48; AIR 1984 SC 516 at pp. 526-28.

the principle of *res judicata* should be applied with caution to industrial adjudication. Thus, even where conditions of service had been changed only a few years before, industrial adjudication has allowed fresh changes when convinced of the necessity and justification for the same. Similarly, wage structure, revision of pay scales, etc., can be examined on the merits of each individual case and technical considerations of *res judicata* should not be allowed to hamper the discretion of industrial adjudication.

It is submitted that the following observations of Gajendragadkar, J. (as he then was) in the case of *Trichinopoly Mills Ltd. v. National Cotton Textile Mill Workers' Union*<sup>201</sup> lay down correct law on the point and require to be quoted:

"It is not denied that the principles of *res judicata* cannot be strictly invoked in the decisions of such points though it is equally true that industrial tribunals would not be justified in changing the amounts of rehabilitation from year to year without sufficient cause."<sup>202</sup>

## (24) Taxation matters

The liability to pay tax from year to year is a separate, distinct and independent liability. Each year of assessment is, therefore, a separate unit and does not apply to subsequent assessments. Consequently, the doctrine of *res judicata* has no application in such cases.<sup>203</sup>

A distinction, however, must be made between a question of fact and pure question of law. Each assessment year, being an independent unit, a decision for one year may not operate as *res judicata* in another year. But if a pure question of law, e.g. constitutional validity of a statute is decided, "it may not be easy to hold that the decision on this basic and material issue would not operate as *res judicata* against the assessee for a subsequent year".<sup>204</sup>

201. AIR 1960 SC 1003 (1960) 2 LLJ 46.

202. *Ibid.*, at p. 1004 (AIR). See also, Authors' Lectures on Administrative Law (2008) Lecture 7.

203. *Broken Hill Proprietary Co Ltd v Broken Hill Municipal Council* 1925 All ER 672 1926 AC 94 1925 All ER 672, *Maharana Mills (P) Ltd v ITO*, AIR 1959 SC 881 1959 Supp (2) SCR 547, *Amalgamated Coalfields Ltd v Janapada Sabha*, AIR 1964 SC 1013 at p. 1019 1963 Supp (1) SCR 172, *Udayan Chhabhai v CIT*, AIR 1967 SC 762 (1967) 1 SCR 913, *M. M. Ipoh v. CIT*, AIR 1968 SC 317 (1968) 1 SCR 65, *Raanasoami Satsang v CIT*, (1992) 1 SCC 659 AIR 1992 SC 377, *Commissioner of Central Excise Nagpur v Shree Baidyanath Ayurved Bhawan Limited* (2009) 12 SCC 419.

204. *Amalgamated Coalfields Ltd v Janapada Sabha*, AIR 1964 SC 1013 1963 Supp (1) SCR 172, *Raanasoami Satsang v CIT* (1992) 1 SCC 659 AIR 1992 SC 377.

## (25) Public interest litigation

Since the primary object of *res judicata* is to bring an end to litigation, there is no reason not to extend the doctrine to public interest litigation. In *Forward Construction Co. v. Prabhat Mandal (Regd)*<sup>205</sup>, the Supreme Court was directly called upon to decide the question. The Apex Court held that the principle would apply to public interest litigation provided it was a *bona fide* litigation. In another case,<sup>206</sup> it was observed, "It is a repetitive litigation on the very same issue coming up before the courts again and again in the garb of public interest litigation. It is high time to put an end to the same."<sup>207</sup> (emphasis supplied)

## (26) Criminal proceedings

The doctrine of *res judicata* is of universal application. It is a fundamental concept in the organisation to every jural society. The rule, therefore, should apply even to criminal proceedings.<sup>208</sup>

Once a person is acquitted or convicted by a competent criminal court, he cannot, once again, be tried for the same offence. As held by the Supreme Court,<sup>209</sup> the principle of *res judicata* is applicable to criminal proceedings also.

In *Sambasivam v. Public Prosecutor, Federation of Malaya*<sup>210</sup>, Lord MacDermott rightly stated that the maxim '*res judicata pro veritate accipitur*' is no less applicable to criminal than to civil proceedings.

## (27) Writ petitions

(a) *General*.—It has been settled since long that though Section 11 of the Code does not, in terms, apply to writ petitions, there is no good ground to preclude decisions in matters in controversy in writ proceedings under Article 32 or Article 226 of the Constitution from operating as *res judicata* in subsequent petitions or regular suits on the same matters in controversy between the same parties and thus to give limited effect to the principle of finality of decision after full contest.<sup>211</sup>

205. (1986) 1 SCC 100; AIR 1986 SC 391.

206. *Ramdas v. Union of India*, AIR 1995 Bom 235.

207. *Ibid*.

208. *Center of Indian Trade Unions v. Union of India*, AIR 1997 Bom 79; (1997) 1 Mah LR 1; (1997) 2 Bom CR 531. For further discussion, see *supra*, "Same parties".

209. *Bhagat Ram v. State of Rajasthan*, (1972) 2 SCC 466. AIR 1972 SC 1502, see also *Daryao v. State of U.P.*, AIR 1961 SC 1457. (1962) 1 SCR 574, *Ramekhal Tiwary v. Madan Mohan Tiwary*, AIR 1967 SC 1156; (1967) 2 SCR 368.

210. 1950 AC 458 at p. 463; 66 TLR 254.

211. *M.S.M. Sharma v. Dr. Shree Krishna*, AIR 1960 SC 1186 at p. 1190 (1961) 1 SCR 96, *Daryao v. State of U.P.*, AIR 1961 SC 1457 (1962) 1 SCR 574, *Raja Jagannath Bakshi v. State of U.P.*, AIR 1962 SC 1563 at p. 1566, *Amalgamated Coalfields Ltd. v. Janapada*

(b) *Doctrine explained.*—In *M.S.M. Sharma v. Dr. Shree Krishna*<sup>212</sup>, for the first time, the Supreme Court held that the general principle of *res judicata* applies even to writ petitions filed under Article 32 of the Constitution of India. Thus, if once the petition filed under Article 32 of the Constitution is dismissed by the court, subsequent petition is barred. Similarly, if a writ petition filed by a party under Article 226 is considered *on merits* as a contested matter and is dismissed, the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed in appeal or in other appropriate proceedings permissible under the Constitution. It would not be open to a party to ignore the said judgment and again move the High Court under Article 226 or the Supreme Court under Article 32 on the same facts and for obtaining the same or similar orders or writs.<sup>213</sup>

In the leading case of *Daryao v. State of U.P.*<sup>214</sup>, the Supreme Court has placed the doctrine of *res judicata* on a higher footing, considering and treating the binding character of judgments pronounced by competent courts as an essential part of the rule of law. Gajendragadkar, J. (as he then was) rightly observed:

"It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of *res judicata* they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Article 32."<sup>215</sup>

Again, there is no good reason to preclude the decisions on matters in controversy in writ proceedings under Article 226 or 32 of the

*Sabha*, AIR 1964 SC 1013 at pp. 1017-20; 1963 Supp (1) SCR 172, *Devilal Modi v. STO*, AIR 1965 SC 1150; (1965) 1 SCR 686, *Gulabchand Chhotatal Parikh v. State of Gujarat*, AIR 1965 SC 1153; (1965) 1 SCR 547, *Virdhunagar Steel Rolling Mills Ltd v Govt of Madras*, AIR 1968 SC 1196 at p. 1198 (1968) 2 SCR 740, *Union of India v Nanak Singh*, AIR 1968 SC 1370 at p. 1372 (1968) 2 SCR 887; *State of Punjab v Bua Das Kaushal*, (1970) 3 SCC 656 at p. 657; AIR 1971 SC 1676 at p. 1677, *Har Swarup v. Central Rly.*, (1975) 3 SCC 621 at pp. 627-28 AIR 1975 SC 202 at pp. 206-07, *Workmen v Board of Trustees, Cochin Port Trust*, (1978) 3 SCC 119 at pp. 124-27 AIR 1978 SC 1283 at pp. 1287-88, *Maqbool Raza v Hasan Raza*, (1977) 3 SCC 578 at p. 580 AIR 1978 SC 1308 at p. 1399, *Sarguja Transport Service v STAT*, (1987) 1 SCC 5 AIR 1987 SC 88, *Direct Recruit Class II Engg. Officers Assn v State of Maharashtra*, (1990) 2 SCC 715 at p. 741, *Avinash Nagra v Navodaya Vidyalaya Samiti* (1997) 2 SCC 534, *Durg Rajnandgaon Grameen Bank v Suresh Kumar Shukla* (1999) 1 SCC 243. See also, Explan to S. 141 as added by the Amendment Act of 1976.

212 AIR 1960 SC 1186 (1961) 1 SCR 96, *Amalgamated Coalfields Ltd v Janapada Sabha* AIR 1964 SC 1013 1963 Supp (1) SCR 172.

213 *Daryao v State of U.P.* AIR 1961 SC 1457 (1962) 1 SCR 574.

214 AIR 1961 SC 1457 (1962) 1 SCR 574.

215 *Ibid.* at p. 1462. AIR; see also *Direct Recruit Class II Engg. Officers' Assn v State of Maharashtra* (1990) 2 SCC 715 at p. 741.

Constitution from operating as *res judicata* in subsequent regular suits on the same matters in controversy between the same parties and thus to give limited effect to the principle of the finality of decisions after full contest.

In *Gulabchand Chhotalal Parikh v. State of Gujarat*<sup>216</sup>, the Supreme Court observed:

"We are of opinion that the provisions of Section 11, CPC are not exhaustive with respect to an earlier decision operating as *res judicata* between the same parties on the same matter in controversy in a subsequent regular suit and that on the general principle of *res judicata*, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a court competent to decide it, will operate as *res judicata* in a subsequent regular suit. It is not necessary that the court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject-matter. *The nature of the former proceeding is immaterial.*"<sup>217</sup> (emphasis supplied)

(c) *Summary dismissal*.—Sometimes a peculiar situation arises. A petition may be dismissed by the court *in limine* without admitting it for final hearing. The question may arise whether such a dismissal of a petition operates as *res judicata*. No hard and fast rule can be laid down, and whether or not such an order of dismissal would constitute a bar would depend upon the facts and circumstances of each case and upon the nature of the order. If the order is on merits, it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not.<sup>218</sup>

If the petition is dismissed *in limine* without passing a speaking order then such dismissal cannot be treated as creating a bar of *res judicata*. It is true that, *prima facie*, dismissal *in limine* even without passing a speaking order in that behalf may strongly suggest that the court took the view that there was no substance in the petition at all; but in the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the court and that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of *res judicata*.

Summary dismissal does not affect the jurisdiction of the court to entertain fresh petition. If the petition is dismissed as withdrawn it cannot be a bar to a subsequent petition under Article 32, because in such a case there has been no decision on merits by the court.<sup>219</sup> The

216. AIR 1965 SC 1153 (1965) 1 SCR 547.

217. *Ibid*, at p. 1167 (AIR)

218. *Daryao v. State of U.P.*, AIR 1961 SC 1457. (1962) 1 SCR 574, *B. Prabhakar Rao v. State of A.P.*, 1985 Supp SCC 432: 1985 Lab IC 1545

219. *Daryao v. State of U.P.*, AIR 1961 SC 1457, see also *Workmen v Board of Trustees, Cochin Port Trust*, (1978) 3 SCC 119 at pp 125-26 AIR 1978 SC 1283 at pp. 1287-88,

reason is simple. The order of a court has to be read as it is. If the court intended to dismiss the petition at the threshold, it could have said so explicitly. In the absence of any indication in the order itself, it would not be proper to enter into the arena of conjecture and to come to a conclusion on the basis of extraneous evidence that the court, in fact, intended to dismiss the petition on merits.<sup>220</sup> If a non-speaking order of dismissal of a petition cannot operate as *res judicata*, obviously, an order permitting the withdrawal of the petition for the same reasons cannot also operate as *res judicata*. At the same time, however, if a petitioner withdraws the petition without permission to file a fresh petition on the same cause of action, a subsequent petition is not maintainable.<sup>221</sup>

(d) *Constructive res judicata*.—A question sometimes arises as to whether the rule of constructive *res judicata* can be applied to writ petitions. This question arose for the first time before the Supreme Court in the case of *Amalgamated Coalfields Ltd. v. Janapada Sabha*<sup>222</sup>. In that case, the earlier notices issued by the respondent Sabha against the companies calling upon them to pay tax were challenged on certain grounds. At the time of hearing of the petitions, an additional ground was also taken and the authority of the Sabha to increase the rate of tax was challenged. However, since there was no pleading, the said point was not allowed to be argued and the petitions were dismissed. The said decision was upheld even by the Supreme Court.<sup>223</sup> Thereafter, once again when the notices were issued in respect of the different period, they were challenged on that additional ground, which was not permitted to be argued in the previous litigation. The High Court dismissed the petitions holding that they were barred by *res judicata*.

Allowing the appeals, the Supreme Court observed:

"It is significant that the attack against the validity of the notices in the present proceedings is based on grounds different and distinct from the grounds raised on the earlier occasion. It is not as if the same ground which was urged on the earlier occasion is placed before the court in another form. The grounds now urged are entirely distinct and so, the decision of the High Court can be upheld only if the principle of constructive *res judicata* could be said to apply to writ petitions filed under Article 32 or Article 226. In our opinion, constructive *res judicata* which is a special and artificial form of *res*

*Ahmedabad Mfg Co v Workmen*, (1981) 2 SCC 663 at pp. 666-67 AIR 1981 SC 960 at pp 962-63

220 *Daryao v State of U P* AIR 1961 SC 1457

221. *Sarguja Transport Service v STAI*, (1987) 1 SCC 5 AIR 1987 SC 88, *State of Maharashtra v Ishwar Pirani* (1996) 1 SCC 542 AIR 1996 SC 722, *Upadhvay & Co v State of U P*, (1999) 1 SCC 81 AIR 1999 SC 599

222 AIR 1964 SC 1013 1963 Supp (1) SCR 172

223 *Ibid*

*judicata enacted by Section 11 of the Civil Procedure Code should not generally be applied to writ petitions filed under Article 32 or Article 226.*"<sup>224</sup>

(emphasis supplied)

In *Gulabchand Chhotalal Parikh v. State of Gujarat*<sup>225</sup> the Supreme Court did not decide the point whether the principles of constructive *res judicata* could be applied to writ petitions and the said question was left open.

However, now the position appears to be well-settled that the principle of constructive *res judicata* also applies to writ petitions. In *Devilal Modi v. STO*<sup>226</sup>, discussing the applicability of constructive *res judicata*, the Supreme Court observed:

"This rule postulates that if a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding which is based on the same cause of action; but, basically, even this view is founded on the same considerations of public policy, because if the doctrine of constructive *res judicata* is not applied to writ proceedings, it would be open to the party to take one proceeding after another and urge new grounds every time; and that plainly is inconsistent with considerations of public policy ..."<sup>227</sup>

(emphasis supplied)

A direct question, however, arose before the Supreme Court in the case of *State of U.P. v. Nawab Hussain*<sup>228</sup>. In that case, a Police S.-I. was dismissed from service by the D.I.-G. He challenged the said decision by filing a writ petition in the High Court on the ground that he was not afforded a reasonable opportunity, but the petition was dismissed. He then filed a suit and raised an additional plea that he was appointed by the I.G.-P. and D.I.-G. was not competent to pass an order against him. The State contended that the suit was barred by constructive *res judicata*. All the courts including the High Court held against the State and the matter was taken to the Supreme Court.

Allowing the appeal and after considering all the leading cases on the point, the court held that the plea was clearly barred by the principle of constructive *res judicata* as such plea was within the knowledge of the Police S.-I. and it could have been taken in the writ petition but was not taken at that time. The principle of *res judicata* comes into play not only when the issue has been directly and explicitly decided by the court, but also when such issue has been implicitly and constructively decided. *When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eyes of the law, to avoid multiplicity of litigation and to bring*

224. *Ibid.*

225. AIR 1965 SC 1153 (1965) 1 SCR 547.

226. AIR 1965 SC 1150 (1965) 1 SCR 686.

227. *Ibid.* at p. 1152 (AIR).

228. (1977) 2 SCC 806; AIR 1977 SC 1680.

about finality in it is deemed to have been constructively in issue and, therefore, is taken as decided.<sup>229</sup> (emphasis supplied)

(e) *Habeas corpus* petitions.—English<sup>230</sup> as well as American<sup>231</sup> courts have taken the view that the principle of *res judicata* is not applicable to a writ of *habeas corpus*. In India also, the doctrine of *res judicata* is not made applicable to cases of *habeas corpus* petitions. In *Ghulam Sarwar v. Union of India*<sup>232</sup>, rejecting the plea of application of constructive *res judicata*, the Supreme Court observed:

"If the doctrine of constructive *res judicata* be applied, this Court, though is enjoined by the Constitution to protect the right of a person illegally detained, will become powerless to do so. That would be whittling down the wide sweep of the constitutional protection."<sup>233</sup> (emphasis supplied)

In *Lallubhai v. Union of India*<sup>234</sup>, the petitioner was detained and the petition filed against the said order was dismissed by the Supreme Court by an order dated 9 May 1980, but the reasons were given on 4 August 1980. After the order of dismissal but before the reasons were recorded, the petitioner filed additional grounds on 21 July 1980. However, on 30 July 1980, he was informed that he may, if so advised, file a fresh petition on those additional grounds, which he did. The question which arose before the Supreme Court was whether the principle of constructive *res judicata* could apply to a writ of *habeas corpus*. After considering leading decisions on the point, Sarkaria, J. made the following remarkable observations, which, it is submitted, lay down correct law:

"The position that emerges from a survey of the above decisions is that the application of the doctrine of constructive *res judicata* is confined to civil actions and civil proceedings. This principle of public policy is entirely inapplicable to illegal detention and does not bar a subsequent petition for

229. *Ibid.* at p 814 (SCC); at p. 1686 (AIR); see also *Workmen v. Board of Trustees, Cochin Port Trust*, (1978) 3 SCC 119 at pp. 124-25; AIR 1978 SC 1283 at p 1287, *Forward Construction Co. v. Prabhat Mandal (Regd.)*, (1986) 1 SCC 100 AIR 1986 SC 391, *Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra*, (1990) 2 SCC 715 at p 741 AIR 1990 SC 1607.

230. *Cox v. Hakes*, (1890) 15 AC 506; *Eshugbayi v. Nigerian Govt.*, 1928 AC 459, *Chapple ex p.* (1950) 66 TLR 932, *Hastings (No. 2), Re.*, (1958) 3 All ER 625, *Hastings (No. 3), Re.*, (1959) 1 All ER 698.

231. *Eduard v. Charles*, (1835) 9 LE 859, *Frank v. Mangum*, 237 US 309 (1915), *Salinger v. Louisel*, 68 L Ed 989 265 US 224 (1923), *Waley v. Johnston*, 86 L Ed 1302 316 US 101 (1941), *U.S. v. Shaughnessy*, 98 L Ed 681 347 US 260 (1959).

232. AIR 1967 SC 1335 (1967) 2 SCR 271.

233. *Ibid.* at p 1338 (AIR) per Subba Rao, C.J. See also *Daryao case*, AIR 1961 SC 1457; *Nazul Ali v. State of W.B.* (1963) 3 SCC 698; *Niranjan Singh v. State of M.P.* (1972) 2 SCC 542; AIR 1972 SC 2215, *T.F. Moiden Koya v. Govt. of Kerala*, (2004) 8 SCC 106 AIR 2004 SC 2120.

234. (1981) 2 SCC 427; AIR 1981 SC 728.

a writ of *habeas corpus* under Article 32 of the Constitution on *fresh grounds*, which were not taken in the earlier petition for the same relief."<sup>235</sup>

(emphasis supplied)

(f) *General principles.*—In the leading case of *Daryao v. State of U.P.*<sup>236</sup>, the Supreme Court has exhaustively dealt with the question of applicability of the principle of *res judicata* in writ proceedings and laid down certain principles which may be summarised thus:

1. If a petition under Article 226 is considered on the merits as a contested matter and is dismissed, the decision would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution.
2. It would not be open to a party to ignore the said judgment and move the Supreme Court under Article 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs.
3. If the petition under Article 226 in a High Court is dismissed not on the merits but because of laches of the party applying for the writ or because it is held that the party had an alternative remedy available to it, the dismissal of the writ petition would not constitute a bar to a subsequent petition under Article 32.
4. Such a dismissal may, however, constitute a bar to a subsequent application under Article 32 where and if the facts thus found by the High Court be themselves relevant even under Article 32.
5. If the writ petition is dismissed *in limine* and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend on the nature of the order. If the order is on the merits, it would be a bar.
6. If the petition is dismissed *in limine* without a speaking order, such dismissal cannot be treated as creating a bar of *res judicata*.
7. If the petition is dismissed as withdrawn, it cannot be a bar to a subsequent petition under Article 32 because, in such a case, there had been no decision on merits by the Court.<sup>237</sup>

To the above principles, few more may be added:

8. The doctrine of constructive *res judicata* applies to writ proceedings and when any point which *might* and *ought* to have been

235. *Ibid.*, at p. 433 (SCC); at p. 731 (AIR); see also *Kirit Kumar v. Union of India*, (1981) 2 SCC 436; AIR 1981 SC 1621; *Sarguja Transport Service v. STAT*, (1987) 1 SCC 5; AIR 1987 SC 88; *T.P. Moideen Koya v. Govt. of Kerala*, (2004) 8 SCC 106 AIR 2004 SC 2120. See also, *Authors' Lectures on Administrative Law* (2012) Lecture 9; *Authors' Administrative Law* (2012) Chap. 10.

236. AIR 1961 SC 1457. (1962) 1 SCR 574.

237. *Daryao v. State of U.P.*, AIR 1961 SC 1457 at pp 1465-66. For detailed discussion, see, V.G. Ramachandran, *Law of Writs* (2006) Vol. II, Pt. III, Chap. 1.

- taken but was not taken in an earlier proceeding cannot be taken in a subsequent proceeding.<sup>238</sup>
9. The rule of constructive *res judicata* however does not apply to a writ of *habeas corpus*. Therefore, even after the dismissal of one petition of *habeas corpus*, a second petition is maintainable if fresh, new or additional grounds are available.<sup>239</sup>
  10. The general principles of *res judicata* apply to different stages of the same suit or proceeding.<sup>240</sup>
  11. If a petitioner withdraws the petition without the leave of the court to institute a fresh petition on the same subject-matter, the fresh petition is not maintainable.<sup>241</sup>

## (28) Dismissal for default

The dismissal of suit in default cannot be said to be a matter "heard and finally decided" on merits and, hence, such dismissal will not operate as *res judicata* between the parties in subsequent proceedings.<sup>242</sup> In *Chand Kour v. Partab Singh*,<sup>243</sup> their Lordships of the Privy Council observed that dismissal of a suit for plaintiff's default of appearance was plainly not intended to operate as *res judicata*. No doubt, it imposes certain disability upon the plaintiff. For instance, he is thereby precluded from bringing a fresh suit in respect of the same cause of action.

## (29) Dismissal in limine

Sometimes, an application may be dismissed by the court by one word "dismissed". It is well-settled that such dismissal of an application *in limine* without passing a speaking order or recording reasons will not operate as *res judicata* in subsequent proceedings. No doubt, *prima facie* such dismissal would indicate that the court considered all the contentions and arguments of the applicant and dismissed the application not finding any substance therein. But in absence of grounds or reasons, it

238 See *supra*, "Constructive *res judicata*".

239 See *supra*, "Habeas Corpus".

240. *Satyadhyam Ghosal v. Deorjin Debi*, AIR 1960 SC 941 (1960) 3 SCR 590, *Arun Singh v. Mohindra Kumar*, AIR 1964 SC 993 (1964) 5 SCR 946, 76, 118, 122, 270, 271, 273, 278, 346, 532, 533; see also *infra*, "Interim Orders".

241. *Daryao v. State of U P.*, AIR 1961 SC 1457 (1962) 1 SCR 574, *Sarguja Transport Service v. STAT.* (1987) 1 SCC 5 AIR 1987 SC 88, *Bhagwandas D. Tandel v. DG of Police.* (1996) 1 Guj LR 782 (1996) 1 Guj LH 433 (1996) 1 Guj CD 738.

242. *Sheodan Singh v. Daryao Kumwar*, AIR 1966 SC 1332 at p. 1336 (1966) 3 SCR 300, *Ram Gohinda v. Bhaktabala*, (1971) 1 SCC 387 at p. 394 AIR 1971 SC 664 at pp. 670-71, *B. Prabhakar Rao v. State of A P.* 1985 Supp SCC 432 at pp. 464-65 AIR 1986 SC 210 at pp. 227-28, *Ram Awadh v. Director of Consolidation*, AIR 1986 All 167, *I C Co v. Union of India* AIR 1976 AP 76.

243. (1887-88) 15 IA 156 (PC) ILR (1889) 16 Cal 98 at p. 102.

is difficult to decide what factors weighed with the court and why order of dismissal was passed.<sup>244</sup>

### (30) Dismissal of special leave petition (SLP)

The dismissal of a special leave petition *in limine* by a non-speaking order does not operate as *res judicata* between the parties and will not bar a fresh petition either under Article 32 or under Article 226 of the Constitution.<sup>245</sup>

As observed in *Workmen v. Board of Trustees, Cochin Port Trust*,<sup>246</sup> the effect of a non-speaking order of dismissal of a special leave petition without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to be that the Supreme Court did not consider it to be a fit case where special leave should be granted. The conclusion might have been reached for several reasons. But when the order was not a speaking one, it cannot be assumed that the Supreme Court had necessarily decided all the questions in relation to the merits of the controversy which was under challenge in special leave petition. The dismissal of a special leave petition *in limine* by a non-speaking order does not, therefore, justify any inference that by necessary implication, the contentions raised in the special leave petition on the merits of the case have been rejected by the Supreme Court.<sup>247</sup>

### (31) Ex parte decree

An *ex parte* decree is a decree passed in absence of the defendant. Where the plaintiff appears and the defendant does not appear when the suit is called out for hearing even though duly served, the court may hear the suit in absence of the defendant and may pass a decree against him. Such decree is called *ex parte* decree.<sup>248</sup>

244. *Daryao v. State of U.P.*, AIR 1961 SC 1457 at pp. 1465-66 (1962) 1 SCR 574.

245. *Workmen v. Board of Trustees, Cochin Port Trust*, (1978) 3 SCC 119. AIR 1978 SC 1283; *Indian Oil Corpn. Ltd. v. State of Bihar*, (1986) 4 SCC 146; AIR 1986 SC 1780, *Ahmedabad Mfg & Calico Printing Co. Ltd. v. Workmen*, (1981) 2 SCC 663; AIR 1981 SC 960; *Supreme Court Employees' Welfare Assn. v. Union of India*, (1989) 4 SCC 187; AIR 1990 SC 334. (1989) 2 LLJ 506; *Yogendra Narayan v. Union of India*, (1996) 7 SCC 1; *Sree Narayana Dharmasanghom Trust v. Swami Prakasananda*, (1997) 6 SCC 78, *State of Maharashtra v. Prabhakar Bhikaji*, (1996) 3 SCC 463 AIR 1996 SC 3069; *Gopabandhu Biswal v. Krishna Chandra*, (1998) 4 SCC 447 AIR 1998 SC 1872

246. (1978) 3 SCC 119; AIR 1978 SC 1283.

247. *Ibid.* at pp. 125-26 (SCC), see also *Indian Oil Corpn. Ltd. v. State of Bihar*, (1986) 4 SCC 146; AIR 1986 SC 1780. For detailed discussion, see, V.G. Ramachandran, *Law of Writs* (2006) Vol. II at pp. 581-83.

248. For detailed discussion of "ex-parte" decree, see *infra*, Chap. 8.

An *ex parte* decree passed by a competent court on merits will operate as *res judicata*. The fact that the defendant did not appear and the decree is *ex parte* is immaterial for application of Section 11 of the Code.<sup>249</sup>

It is well-settled that a party is as much bound by an *ex parte* decree as by a *bi-parte* decree. The only difference between the two is that in the former, the defendant was absent while in the latter, he was present.<sup>250</sup>

### (32) Compromise decree

A compromise decree is not a decision by a court. It is the acceptance by a court of something to which the parties had agreed. A compromise decree merely sets the seal of a court on the agreement of parties. A court does not decide anything. Nor can it be said that the decision of a court is implicit in it.<sup>251</sup>

The decisions of courts are not uniform on the question whether the doctrine of *res judicata* applies to consent decrees. In some cases, it has been held that consent decrees operates as *res judicata*<sup>252</sup> whereas in some other cases, a contrary view is taken.<sup>253</sup>

It is submitted that the correct view is that the doctrine of *res judicata* does not apply to a consent decree, as in a consent decree a matter cannot be said to be "heard and finally decided" on merits. Such decree, however, precludes a party from challenging it by a rule of estoppel.<sup>254</sup>

### (33) Fraudulent decree

If a party obtains a decree from a court by practising fraud, he cannot invoke the doctrine of *res judicata*. It is settled law that a judgment may be *res judicata* and, hence, may not be impeachable from within, but it

249. *Chandu Lal Agarwalla v. Khalilur Rahaman*, (1949-50) 77 IA 27 AIR 1950 PC 17, *Raj Lakshmi v. Banamali Sen*, AIR 1953 SC 33 1953 SCR 154, *Ram Gobinda v. Bhaktabata*, (1971) 1 SCC 387 AIR 1971 SC 664, *Pandurang Ramchandra v. Shantibai Ramchandra*, 1989 Supp (2) SCC 627 AIR 1989 SC 2240

250. *Ibid*, see also *Vishnu Sagar Mills Ltd v. ISP Trading Co.*, AIR 1984 Cal 246 *Bramhanand Rai v. Director of Consolidation*, AIR 1987 All 100. (1986) 12 All LR 97 1986 All WC 306

251. *Pulavarthi Venkata v. Valluri Jagannadha*, AIR 1967 SC 591 (1964) 2 SCR 310, *Baldevdas v. Filmistan Distributors (India) (P) Ltd.*, (1969) 2 SCC 201 AIR 1970 SC 406

252. *Subba Rao*, AIR 1967 SC 591 at p 595 (AIR), *Baldevdas*, (1969) 2 SCC 201 at p 206 AIR 1970 SC 406 at pp 409-10

253. *Shankar v. Balkrishna*, AIR 1954 SC 352 (1955) 1 SCR 99 *Prithuchand v. S Y Shinde*, (1993) 3 SCC 271 AIR 1993 SC 1929.

254. *Sunderabai v. Devaji Shankar Deshpande*, AIR 1954 SC 82, *Sailendra Narayan Bhamia Deo v. State of Orissa* AIR 1956 SC 346 1956 SCR 72 see also *Subba Rao* AIR 1967 SC 591 *Baldevdas Shankar*, (1969) 2 SCC 201 at p 206 *Prithuchand*, (1993) 3 SCC 271 For detailed discussion and conflicting decisions, see *Authors' Code of Civil Procedure* (Lawyers' Edn) Vol I at pp 230-34

may be impeached from without. In other words, it may not be permissible to show that the court was "mistaken", but it can certainly be shown that it was "misled". The principle of finality of litigation cannot be pressed to the extent of such an absurdity that it becomes an engine of oppression in the hands of dishonest litigants.<sup>255</sup>

### (34) Withdrawal of suit

A withdrawal of a suit does not operate as *res judicata* in filing a subsequent suit for the same cause of action. The basic principle of *res judicata* being final adjudication on merits, there can be no bar of *res judicata* if the suit is withdrawn. It is true that ordinarily when the plaintiff or the applicant finds that the court is not likely to grant relief that he seeks permission to withdraw the suit or application. But since there is no decision on merits, there cannot be a bar of *res judicata* in instituting a fresh suit or application. But such withdrawal would be a bar to the filing of a fresh suit under Or. 23 R. 1 of the Code.<sup>256</sup>

### (35) Change in circumstances

The doctrine of *res judicata* applies to static situations and not to changing circumstances.

Thus, if a suit for eviction on the ground of *bona fide* requirement is dismissed, the second suit would not operate as *res judicata* if circumstances have been changed. It is well-settled that *bona fide* need must be considered with reference to the time when suit is taken up for hearing and is decided.<sup>257</sup>

Again, even if earlier petition by husband against his wife for divorce on ground of cruelty or desertion was dismissed for want of evidence, the subsequent petition will not be barred if the wife herself has stated that she is not inclined to return to matrimonial home.<sup>258</sup>

### (36) Change in law

Where subsequent to a decision rendered by a court, the law has been changed, *res judicata* will not operate. Cases must be decided upon the

255. *Lazarus Estates Ltd v. Beasley*, (1956) 1 QB 702; (1956) 2 WLR 502; (1956) 1 All ER 341 (CA); *S.P. Chengalvaraya Naidu v. Jagannath*, (1994) 1 SCC 1; AIR 1994 SC 853, *Indian Bank v. Satyam Fibres India (P) Ltd.*, (1996) 5 SCC 550; *Beli Ram v. Chaudri Mohammad Afzal*, AIR 1948 PC 168, *Satya v. Teja Singh*, (1975) 1 SCC 120; AIR 1975 SC 105.

256. *Sarguja Transport Service v. STAT*, (1987) 1 SCC 5, see also *infra*, Chap. 12.

257. *Surajmal v. Radheyshyam*, (1988) 3 SCC 18. AIR 1988 SC 1348, *Korin v. India Cable Co Ltd.*, (1978) 1 SCC 98; AIR 1978 SC 312.

258. *Pramod Purshottam v. Vasundhara Pramod*, AIR 1989 Bom 75; *Ram Shanker Rastogi v. Vinay Rastogi*, AIR 1991 All 255; (1991) 13 All LR 67.

law as it stands when judgment is pronounced and not upon what it was at the date of previous suit the law having been altered in the meantime.<sup>259</sup>

### (37) Erroneous decision

The doctrine of *res judicata* applies whether the point involved in the earlier decision is one of fact, or one of law, or one of mixed law and fact.<sup>260</sup>

An incorrect decision is not the same as without jurisdiction. A wrong decision by a court having jurisdiction is as much binding between the parties as a right one and may be set aside only in *appeals* or revisions to higher courts or tribunals if the law provides such remedy.<sup>261</sup> A pure question of law or of jurisdiction, however, does not operate as *res judicata*.<sup>262</sup>

### (38) Test

In order to decide the question whether a subsequent proceeding is barred by *res judicata* it is necessary to examine the question with reference to (i) forum or competence of the court; (ii) parties and their representatives; (iii) matters in issue; (iv) matters which ought to have been made ground for attack or defence in the former suit; and (v) the final decision.<sup>263</sup>

### (39) Interim orders

The doctrine of *res judicata* applies also to different stages of the same suit or proceeding. If any interlocutory order decides a controversy in part between parties, such decision would bind the parties and operate as *res judicata* at all subsequent stages of the suit and a court will not permit the party to "set the clock back" during the pendency of the proceeding.<sup>264</sup> For instance, orders regarding impleadment of parties,

259. *Alimunnissa Chowdhurani v Shama Charan Roy*, ILR (1905) 32 Cal 749 (1905-06) 9 CWN 466, *Jaisingh v. Mamanchand*, (1980) 3 SCC 162 AIR 1980 SC 1201, *Mathura Prasad v Dossibai N B Jeejeebhoy*, (1970) 1 SCC 613, AIR 1971 SC 2355.

260. *Halsbury's Laws of England* (2nd Edn) Vol. 13, para 464 at pp. 409-10, *Mathura Prasad v Dossibai N B Jeejeebhoy*, (1970) 1 SCC 613, AIR 1971 SC 2355.

261. *Ibid*, see also *Isabella Johnson v M A Susai*, (1991) 1 SCC 494, *Tarini Charan v Kedar Nath*, AIR 1928 Cal 777 ILR (1928) 56 Cal 723 33 CWN 126, *Mohanlal Goenka v Benoy Krishna*, AIR 1953 SC 65 1953 SCR 377.

262. *Mathura Prasad v Dossibai N B Jeejeebhoy*, (1970) 1 SCC 613. For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. I at pp. 278-93.

263. *Jaswant Singh v Custodian*, (1985) 3 SCC 648 AIR 1985 SC 1096.

264. *Satyadhyayan Ghosal v Deorjun Debi*, AIR 1960 SC 941, *Arjun Singh v Mohindra Kumar*, AIR 1964 SC 993, *Pranlad Singh v Sukaler Singh*, (1987) 1 SCC 727 AIR 1987 SC 1145.

maintainability of a suit, jurisdiction of the Court, etc., once passed cannot be reopened in the same proceedings. It is, however, open to the party to challenge the correctness of such order later on in regular appeals or other appropriate proceedings arising out of the final judgment of the court.<sup>265</sup>

#### (40) Power of court to correct errors

"One of the first and highest duties of all courts is to take care that the act of the court does no injury to the suitors".<sup>266</sup> It has been said that "an act of court shall harm none" (*actus curiae neminem gravabit*). All courts, therefore, are bound to take care that their acts do not cause harm or injury to suitors.

In the leading case of *A.R. Antulay v. R.S. Nayak*<sup>267</sup>, the Constitution Bench of the Supreme Court ordered withdrawal of a case against the appellant pending in the court of a Special Judge and transferred it to the High Court of Bombay. A preliminary objection was raised by the appellant against the jurisdiction of the High Court. It was, however, negatived by the court. The appellant then approached that Supreme Court. It was contended that the direction was contrary to law and could not have been issued. The argument of the respondent was of *res judicata*.

Allowing the appeal and recalling the earlier order, the Apex Court observed that the direction was violative of fundamental rights of the appellant and no rule of *res judicata* would apply to such a situation.<sup>268</sup>

### 4. BAR OF SUIT: SECTION 12

Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any court to which this Code applies.<sup>269</sup>

*Devidayal Rolling Mills v. Prakash Chimanlal*, (1993) 2 SCC 470; *Ishwar Dutt v. Land Acquisition Collector*, (2005) 7 SCC 190; AIR 2005 SC 3165; *Ajay Mohan v. H N. Rai*, (2008) 2 SCC 507; AIR 2008 SC 804.

265. *Ibid*, see also *Jasraj Inder Singh v. Hemraj Multanchand*, (1977) 2 SCC 155; AIR 1977 SC 1011, *Sukhrani v. Hari Shanker*, (1979) 2 SCC 463. AIR 1979 SC 1436, *Devidayal Rolling Mills v. Prakash Chimanlal*, (1993) 2 SCC 470; see also, second proviso to Or. 39 R. 4.

266. *Rodger v. Comptoir D'Escompte de Paris*, LR (1871) 3 PC 465 (1870-71) 7 Moo PC (NS) 314; 17 ER 120, *Jang Singh v. Brij Lal*, AIR 1966 SC 1631. (1964) 2 SCR 145. For detailed discussion, see, Part V, Chap. 2, *infra*.

267. (1988) 2 SCC 602; AIR 1988 SC 1531

268. *Ibid*, see also *Devidayal Rolling Mills v. Prakash Chimanlal Parikh*, (1993) 2 SCC 470; AIR 1993 SC 1982.

269. S. 12. For detailed discussion, see, those provisions.

The Code of Civil Procedure precludes a plaintiff from instituting a suit in the following cases:

(1)	Section 11	—	Where a suit is barred by <i>res judicata</i> .
(2)	Section 21-A	—	Where a decree is sought to be challenged on objection as to territorial (and/or pecuniary) jurisdiction of a Court.
(3)	Section 47(1)	—	Where questions relate to execution, discharge or satisfaction of decree.
(4)	Section 95(2)	—	Where an order is made determining an application for compensation for arrest, attachment or temporary injunction.
(5)	Section 144(2)	—	Where restitution can be claimed.
(6)	Order 2 Rule 2	—	Where there is omission to sue in respect of part of claim by a plaintiff.
(7)	Order 9 Rule 9	—	Where a decree is passed against a plaintiff by default.
(8)	Order 11 Rule 21(2)	—	Where a suit is dismissed for non-compliance with an order of discovery.
(9)	Order 22 Rule 9	—	Where a suit has abated.
(10)	Order 23 Rule 1(1)	—	Where a suit or part of a claim has been abandoned by a plaintiff.
(11)	Order 23 Rule 1(3)	—	Where a suit or part of a claim has been withdrawn by a plaintiff without the leave of the court.
(12)	Order 23 Rule 3-A	—	Where a compromise decree is sought to be challenged on the ground that the compromise was not lawful.

## CHAPTER 3

# Foreign Judgment

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### 1. GENERAL

Sections 13 and 14 enact a rule of *res judicata* in case of foreign judgments. These provisions embody the principle of private international law that a judgment delivered by a foreign court of competent jurisdiction can be enforced by an Indian court and will operate as *res judicata* between the parties thereto except in the cases mentioned in Section 13.

### 2. FOREIGN COURT: DEFINITION

"Foreign court" is defined as a court situate outside India and not established or continued by the authority of the Central Government.<sup>1</sup>

1. S. 2(5). For detailed discussion, see *supra*, Pt. I, Chap. 2.

### 3. FOREIGN JUDGMENT: DEFINITION

"Foreign judgment" means a judgment of a foreign court.<sup>2</sup> In other words, a foreign judgment means an adjudication by a foreign court upon a matter before it.<sup>3</sup> Thus judgments delivered by courts in England, France, Germany, USA, etc. are foreign judgments.

### 4. NATURE AND SCOPE

Section 13 embodies the principle of *res judicata* in foreign judgments. This provision embodies the principle of private international law that a judgment delivered by a foreign court of competent jurisdiction can be enforced in India. The rule laid down in Section 13 is substantive law and not merely a rule of procedure.<sup>4</sup> The section is not confined in its application to plaintiffs. A defendant is equally entitled to non-suit the plaintiff on the basis of a foreign judgment.<sup>5</sup>

### 5. OBJECT

The judgment of a foreign court is enforced on the principle that where a court of competent jurisdiction has adjudicated upon a claim, a legal obligation arises to satisfy that claim. The rules of private international law of each State must in the very nature of things differ, but by the comity of nations certain rules are recognised as common to civilised jurisdictions. Through part of the judicial system of each State these common rules have been adopted to adjudicate upon disputes involving a foreign element and to effectuate judgments of foreign courts in certain matters, or as a result of international conventions.<sup>6</sup> Such a recognition is accorded not as an act of courtesy but on considerations of justice, equity and good conscience.<sup>7</sup> An awareness of foreign law in a parallel jurisdiction would be a useful guideline in determining our

2. S 2(6) For detailed discussion see *supra* Pt I, Chap 2

3. *Brijlal Ramjidas v Govindram Gordhandas Seksaria*, (1946-47) 74 IA 203 AIR 1947 PC 192 (194).

4. *Molgi Nar Singh Rao Shitole v Sankar Saran*, AIR 1962 SC 1737 (1963) 2 SCR 577. *Lalji Raja and Sons v. Hansraj Nathuram*, (1971) 1 SCC 721 AIR 1971 SC 974 (1971) 3 SCR 815.

5. *Badat and Co v East India Trading Co.*, AIR 1964 SC 538 at pp 554-55 (1964) 4 SCR 19. *R. Viswanathan v Rukn-ul-Mulk Sued Abdul*, AIR 1963 SC 1 at pp 14-15 (1963) 3 SCR 22. *Satya v Teja Singh* (1975) 1 SCC 120 AIR 1975 SC 105.

6. *R. Viswanathan v Rukn-ul-Mulk Sued Abdul*, AIR 1963 SC 1 at pp 14-15 (1963) 3 SCR 22. *Badat and Co v East India Trading Co.*, AIR 1964 SC 538 at p 557 (1964) 4 SCR 19. *Sunder Kaur v Harbax Singh* (1984) 3 SCC 608 at p 703 AIR 1984 SC 1224 at p 1226. *Narasimha Rao v Venkata Lakshmi* (1991) 3 SC C 451 at pp 458-60.

7. *Satya v Teja Singh* (1975) 1 SCC 120 AIR 1975 SC 105. *Badat and Co v East India Trading Co.* AIR 1964 SC 538 at p 552 (AIR).

notions of justice and public policy. We are sovereign within our territory but "it is no derogation of sovereignty to take account of foreign law".<sup>8</sup>

As has been rightly observed by a great jurist,<sup>9</sup> "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home"; and we shall not brush aside foreign judicial process unless doing so "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal".

## 6. ILLUSTRATIONS

Let us see some illustrations to understand the principle:

- (i) A sues B in a foreign court. The suit is dismissed. The judgment will operate as a bar to a fresh suit by A against B in India on the same cause of action.
- (ii) A sues B in a foreign court. The suit is decreed. A then sues B on that judgment in India. B will be precluded from putting in issue the matters which were directly and substantially in issue before the foreign court and adjudicated upon by the court.
- (iii) A sues B in a foreign court and obtains a decree. He then sues B on that judgment in India. B is not precluded from raising a plea that the judgment of the foreign court is not conclusive and does not operate as *res judicata* since it was obtained by fraud (or was not given on merits; or was contrary to law; or was opposed to natural justice, etc).

## 7. JURISDICTION OF FOREIGN COURT

It is well-settled proposition in private international law that unless a foreign court has jurisdiction in the international sense, a judgment delivered by that court would not be recognised or enforced in India.<sup>10</sup> But the jurisdiction which is important in such matters is only the competence of the court, i.e. territorial competence over the subject-matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as material by the courts in this country.<sup>11</sup>

8. *Satya v. Teja Singh*, (1975) 1 SCC 120: AIR 1975 SC 105.

9. Cardozo, J. in *Loucks v. Standard Oil Co. of New York*, (1918) 224 NY 99 at p. 111

10. *Sankaran Govindan v. Lakshmi Bharathi*, (1975) 3 SCC 351 at p. 368. AIR 1974 SC 1764 at p. 1766.

11. *R. Viswanathan v. Rukn-ul-Mulk Syed Abdul*, AIR 1963 SC 1 at pp 14, 54-55: (1963) 3 SCR 22.

The material date to decide the jurisdiction of the court is the time when the suit is instituted.<sup>12</sup>

## 8. BINDING NATURE OF FOREIGN JUDGMENT: PRINCIPLES

The Code of Civil Procedure provides that a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except:

- (a) where it has not been pronounced by a court of competent jurisdiction;
- (b) where it has not been given on the merits of the case;
- (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;
- (d) where the proceedings in which the judgment was obtained are opposed to natural justice;
- (e) where it has been obtained by fraud;
- (f) where it sustains a claim founded on a breach of any law in force in India.<sup>13</sup>

## 9. FOREIGN JUDGMENT WHEN NOT BINDING: CIRCUMSTANCES: SECTION 13

Under Section 13 of the Code, a foreign judgment is conclusive and will operate as *res judicata* between the parties thereto except in the cases mentioned therein. In other words, a foreign judgment is not conclusive as to any matter directly adjudicated upon, if one of the conditions specified in clauses (a) to (f) of Section 13 is satisfied and it will then be open to a collateral attack.<sup>14</sup>

Dicey<sup>15</sup> rightly states:

"A foreign judgment is conclusive as to any matter thereby adjudicated upon and cannot be impeached for any error either

- (1) of fact, or
- (2) of law"

In the following six cases, a foreign judgment shall not be conclusive:

12 *Andhra Bank Ltd v R. Srinivasan* AIR 1962 SC 232 at p. 236 (1962) 3 SCR 391.

13 S. 13.

14 *Satya v Teja Singh*, (1975) 1 SCC 120 AIR 1975 SC 105. *Narasimha Rao v Venkata Lakshmi* (1991) 3 SC 451 at pp. 562-63.

15 *Conflict of Laws* (7th Edn) R. 183 cited in *R. Viswanathan v Rukn-ul-Mulk Sued Abdul*, AIR 1963 SC 1 at p. 54 (1963) 3 SCR 22.

- (1) Foreign judgment not by a competent court;
- (2) Foreign judgment not on merits;
- (3) Foreign judgment against International or Indian Law;
- (4) Foreign judgment opposed to natural justice;
- (5) Foreign judgment obtained by fraud; and
- (6) Foreign judgment founded on a breach of Indian Law.

### (1) Foreign judgment not by a competent court

It is a fundamental principle of law that the judgment or order passed by the court which has no jurisdiction is null and void. Thus, a judgment of a foreign court to be conclusive between the parties must be a judgment pronounced by a court of competent jurisdiction.<sup>16</sup> Such judgment must be by a court competent both by the law of the State which has constituted it and in an international sense and it must have directly adjudicated upon the "matter" which is pleaded as *res judicata*.<sup>17</sup> But what is conclusive is the judgment, i.e., the final adjudication and not the reasons for the judgment given by the foreign court.<sup>18</sup>

Thus, if A sues B in a foreign court, and if the suit is dismissed, the decision will operate as a bar to a fresh suit by A in India on the same cause of action. On the other hand, if a decree is passed in favour of A by a foreign court against B and he sues B on the judgment in India, B will be precluded from putting in issue the same matters that were directly and substantially in issue in the suit and adjudicated upon by the foreign court.

The leading case on the point is *Gurdayal Singh v. Rajah of Faridkote*<sup>19</sup>. In that case, A filed a suit against B in the court of the Native State of Faridkot, claiming Rs 60,000 alleged to have been misappropriated by B, while he was in A's service at Faridkot. B did not appear at the hearing, and an *ex parte* decree was passed against him. B was a native of another Native State Jhind. In 1869, he left Jhind and went to Faridkot to take up service under A. But in 1874, he left A's service and returned to Jhind. The present suit was filed against him in 1879; when he neither resided at Faridkot nor was he domiciled there. On these facts, on general principles of international law, the Faridkot court had no jurisdiction to entertain a suit against B based on a mere personal claim against him. The decree passed by the Faridkot court in these

16. *R. Viswanathan v. Rukn-ul-Mulk Syed Abdul*, AIR 1963 SC 1 at pp. 14-15; (1963) 3 SCR 22; *Satya v. Teja Singh*, (1975) 1 SCC 120; AIR 1975 SC 105; *Sankaran Govindan v. Lakshmi Bharathi*, (1975) 3 SCC 351 at p. 368; AIR 1974 SC 1764 at p. 1776

17. *R. Viswanathan v. Rukn-ul-Mulk Syed Abdul*, AIR 1963 SC 1 at p. 21. (1963) 3 SCR 22; *Satya v. Teja Singh*, (1975) 1 SCC 120; AIR 1975 SC 105.

18. *Viswanathan v. Abdul Wajid*, AIR 1963 SC 1

19. (1893-94) 21 IA 171; ILR (1895) 22 Cal 222 (PC).

circumstances was an absolute nullity. When *A* sued *B* in a court in British India, against *B* on the judgment of the Faridkot court, the suit was dismissed on the ground that Faridkot court had no jurisdiction to entertain the suit. The mere fact that the embezzlement took place at Faridkot, was not sufficient to give jurisdiction to the Faridkot court. But if *B* was residing at Faridkot at the date of the suit, the Faridkot court would have had complete jurisdiction to entertain the suit and to pass a decree against him.

Similarly, a court has no jurisdiction to pass a decree in respect of immovable property situated in a foreign State. A decree passed by a court in Ceylon against a native of India in a suit on a contract who was not residing in Ceylon is a nullity; and cannot be enforced by an Indian court.

## (2) Foreign judgment not on merits

In order to operate as *res judicata*, a foreign judgment must have been given on merits of the case.<sup>20</sup> A judgment is said to have been given on merits when, after taking evidence and after applying his mind regarding the truth or falsity of the plaintiff's case, the judge decides the case one way or the other. Thus, when the suit is dismissed for default of appearance of the plaintiff; or for non-production of the document by the plaintiff even before the written statement was filed by the defendant, or where the decree was passed in consequence of default of defendant in furnishing security, or after refusing leave to defend, such judgments are not on merits.<sup>21</sup> However, the mere fact of a decree being *ex parte* will not necessarily justify a finding that it was not on merits.<sup>22</sup>

The real test for deciding whether the judgment has been given on merits or not is to see whether it was merely formally passed as a matter of course, or by way of penalty for any conduct of the defendant, or is based upon a consideration of the truth or falsity of the plaintiff's claim, notwithstanding the fact that the evidence was led by him in the absence of the defendant.

20 *Narasimha Rao v Venkata Lakshmi*, (1991) 3 SCC 451

21. *Keymer v. P Visvanatham*, (1916-17) 44 IA 6 AIR 1916 PC 121 *Isidore Fernando v Thommai Antoni*, AIR 1933 Mad 544, *K M Abdul Jabbar v Indo Singapore Traders (P) Ltd.*, AIR 1981 Mad 118, *O P Verma v. Lala Gehrilal*, AIR 1962 Raj 231 at p. 240, *Lalu Raja & Sons v Firm Hansraj Nathuram*, (1971) 1 SCC 721 at p. 726 AIR 1971 SC 974 at p. 977, *International Woollen Mills v Standard Wool (U K) Ltd.*, (2001) 5 SCC 265 AIR 2001 SC 2134

22 *Lalu Raja & Sons v Firm Hansraj Nathuram*, (1971) 1 SCC 721 at p. 725 AIR 1971 SC 974 at p. 977, *R M V Vellachi Achi v R M A Ramanathan Chettiar* AIR 1973 Mad 141 (1972) 2 MLJ 468

### (3) Foreign judgment against International or Indian law

A judgment based upon an incorrect view of international law or a refusal to recognise the law of India where such law is applicable is not conclusive.<sup>23</sup> But the mistake must be apparent on the face of the proceedings. Thus, where in a suit instituted in England on the basis of a contract made in India, the English court erroneously applied English Law, the judgment of the court is covered by this clause inasmuch as it is a general principle of Private International Law that the rights and liabilities of the parties to a contract are governed by the place where the contract is made (*lex loci contractus*).<sup>24</sup>

"When, therefore, a foreign judgment is founded on a jurisdiction or on a ground not recognised by Indian law or International law, it is a judgment which is in defiance of the law. Hence, it is not conclusive of the matters adjudicated therein and, therefore, unenforceable in this country."<sup>25</sup>

### (4) Foreign judgment opposed to natural justice<sup>26</sup>

It is the essence of a judgment of a court that it must be obtained after due observance of the judicial process, i.e., the court rendering the judgment must observe the minimum requirements of natural justice—it must be composed of impartial persons, act fairly, without bias, and in good faith; it must give reasonable notice to the parties to the dispute and afford each party adequate opportunity of presenting his case. A judgment which is the result of bias or want of impartiality on the part of a judge will be regarded as a nullity and the trial "*coram non iudice*".<sup>27</sup>

Thus, a judgment given without notice of the suit to the defendant or without affording a reasonable opportunity of representing his case is opposed to natural justice. Similarly, a judgment against a party not properly represented in the proceedings or where the judge was biased is contrary to natural justice and, therefore, does not operate as *res judicata*.

But the expression "natural justice" in clause (d) of Section 13 relates to the irregularities in procedure rather than to the merits of the case.<sup>28</sup>

23. *R. Viswanathan v. Rukn-ul-Mulk Syed Abdul*, AIR 1963 SC 1 at pp. 21, 23: (1963) 1 SCR 22, *Badat and Co. v. East India Trading Co.*, AIR 1964 SC 538 at p. 554: (1964) 4 SCR 19.

24. *Gurdial Singh v. Rajah of Faridkote*, (1893-94) 21 IA 171. ILR(1895) 22 Cal 222 (PC), *Vishwanath v. Abdul Wajid*, AIR 1963 SC 1 at pp. 21-22 (AIR).

25. *Narasimha Rao v. Venkata Lakshmi*, (1991) 3 SCC 451 at p. 461; *Satya v. Teja Singh*, (1975) 1 SCC 120: AIR 1975 SC 105.

26. For detailed discussion see, *Authors' Lectures on Administrative Law* (2008) Lecture VI.

27. *Viswanathan v. Abdul Wajid*, AIR 1961 SC 1 at pp. 24-25, 32; *Sankaran Govindan v. Lakshmi Bharathi*, (1975) 3 SCC 351 at p. 356: AIR 1974 SC 1764 at p. 1768.

28. *Sankaran Govindan v. Lakshmi Bharathi*, (1975) 3 SCC 351, 367. AIR 1974 SC 1764, 1775-76 at p. 367 (SCC) at pp. 1775-76 (AIR).

A foreign judgment of a competent court, therefore, is conclusive even if it proceeds on an erroneous view of the evidence or the law, if the minimum requirements of the judicial process are assured; correctness of the judgment in law or on evidence is not predicated as a condition for recognition of its conclusiveness by the municipal court.<sup>29</sup> Thus, a foreign judgment is not open to attack on the ground that the law of domicile had not been properly applied in deciding the validity of adoption or that the court disagrees with the conclusion of the foreign court, if otherwise the principles of natural justice have been complied with.

### (5) Foreign judgment obtained by fraud

It is a well-established principle of Private International Law that if a foreign judgment is obtained by fraud, it will not operate as *res judicata*.<sup>30</sup>

It has been said, "Fraud and justice never dwell together" (*fraus et jus nunquam cohabitant*); or "Fraud and deceit ought to benefit none" (*fraus et dolus nemini patrocinari debent*).<sup>31</sup>

Lord Denning<sup>32</sup> observed, "No judgment of a court, no order of a Minister, can be allowed to stand, if it has been obtained by fraud." Cheshire<sup>33</sup> rightly states, "It is firmly established that a foreign judgment is impeachable for fraud in the sense that upon proof of fraud it cannot be enforced by action in England."<sup>34</sup> All judgments whether pronounced by domestic or foreign courts are void if obtained by fraud, for fraud vitiates the most solemn proceeding of a court of justice.<sup>35</sup>

Explaining the nature of fraud, de Grey, C.J.<sup>36</sup> stated that though a judgment would be *res judicata* and not impeachable from within, it might be impeachable from without. In other words, though it is not permissible to show that the court was "mistaken", it might be shown that it was "misled". There is an essential distinction between mistake and trickery. The clear implication of the distinction is that an action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely, that on the merits, the decision was one

29. *Kiswanathan v. Abdul Wajid*, AIR 1961 SC 1 at pp. 24-25 (AIR)

30. *Sankaran Govindan v. Lakshmi Bharathi*, (1975) 3 SCC 351 at p. 356 AIR 1974 SC 1764 at p. 1768.

31. *A.V. Papayya Sastry v. Govt. of A.P.*, (2007) 4 SCC 221 at p. 231 AIR 2007 SC 1546

32. *Lazarus Estates Ltd. v. Beasley*, (1956) 1 QB 702. (1956) 2 WLR 502 (1956) 1 All ER 341 (CA)

33. *Private International Law* (8th Edn.) at p. 368.

34. *Satya v. Teja Singh*, (1975) 1 SCC 120 AIR 1975 SC 195

35. *Mohendro Narain v. Gopal Mondul*, ILR (1890) 17 Cal 769 at p. 784 (FB) S.P. Chengalwaraya Naidu v. Jagannath (1994) 1 SCC 1 AIR 1994 SC 853. *Mahboob Sahab v. Syed Ismail* (1995) 3 SCC 693 AIR 1995 SC 1205

36. *Duchess of Kingston*, *Smith's Leading Cases* (13th Edn.) at pp. 644, 651

which should not have been rendered, but it can be set aside if the court was imposed upon or tricked into giving the judgment.<sup>37</sup>

In *A.V. Papayya Sastry v. Govt. of A.P.*,<sup>38</sup> the Supreme Court observed:

Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the cost of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether *in rem* or *in personam*. The principle of 'finality of litigation' cannot be stretched to the extent of an absurdity that it can be utilised as an engine of oppression by dishonest and fraudulent litigants.<sup>39</sup>

In the leading case of *Satya v. Teja Singh*<sup>40</sup>, a husband obtained a decree of divorce against his wife from an American court averring that he was domiciled in America. Observing that the husband was not a *bona fide* resident or domicile of America, and he had played fraud on a foreign court falsely representing to it incorrect jurisdictional fact, the Supreme Court held that the decree was without jurisdiction and a nullity.

Again, in *Narasimha Rao v. Venkata Lakshmi*<sup>41</sup>, A (husband) obtained a decree of divorce against B (wife) again from an American court on the ground that he was a resident of America. Then he remarried C. B filed a criminal complaint against A and C for bigamy. A and C filed an application for discharge. Dismissing the application, the Supreme Court held that the decree of dissolution of marriage was without jurisdiction inasmuch as neither the marriage was solemnized nor the parties last resided together in America. It was, therefore, unenforceable in India.

In *S.P. Chengalvaraya Naidu v. Jagannath*<sup>42</sup>, the Supreme Court stated, "It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and *non est* in the eye of the law. Such a judgment/decreed—by the first court or by the highest court—has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."<sup>43</sup>

(emphasis supplied)

In *A.V. Papayya Sastry v. Govt. of A.P.*,<sup>44</sup> after referring to leading cases on the point, the Supreme Court stated:

37. *Satya v. Teja Singh*, (1975) 1 SCC 120. AIR 1975 SC 105; *Sankaran Govindan v. Lakshmi Bharathi*, (1975) 3 SCC 351 at p. 359. AIR 1974 SC 1764 at pp. 1769-70.

38. (2007) 4 SCC 221: AIR 2007 SC 1546.

39. *Ibid*, at pp. 231-32 (SCC) (per C.K. Thakker, J.)

40. (1975) 1 SCC 120: AIR 1975 SC 105.

41. (1991) 3 SCC 451.

42. (1994) 1 SCC 1: AIR 1994 SC 853.

43. *Ibid*, at p. 2 (SCC). at p. 853 (AIR).

44. (2007) 4 SCC 221: AIR 2007 SC 1546.

It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and *non est* in the eye of law. Such a judgment, decree or order—by the first court or by the final court—has to be treated as nullity by every court, superior or inferior. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings.<sup>45</sup>

The fraud may be either fraud on the part of the party invalidating a foreign judgment in whose favour the judgment is given or fraud on the court pronouncing the judgment.<sup>46</sup> Such fraud, however, should not be merely constructive, but must be actual fraud consisting of representations designed and intended to mislead; a mere concealment of fact is not sufficient to avoid a foreign judgment.<sup>47</sup> The High Court of Madras<sup>48</sup> has held that merely because the plaintiff obtains a decree upon perjured evidence, it cannot be said that the decree has been obtained by fraud. It is submitted that the view expressed by the High Court of Madras appears to be erroneous in view of the above discussion and does not lay down correct law.

#### (6) Foreign judgment founded on breach of Indian law

Where a foreign judgment is founded on a breach of any law in force in India, it would not be enforced in India. The rules of Private International Law cannot be adopted mechanically and blindly.<sup>49</sup> Every case which comes before an Indian court must be decided in accordance with Indian law. It is implicit that the foreign law must not offend our public policy.<sup>50</sup>

Thus, a foreign judgment for a gaming debt or on a claim which is barred under the Law of Limitation in India is not conclusive. Similarly, a decree for divorce passed by a foreign court cannot be confirmed by an Indian court if under the Indian law the marriage is indissoluble.<sup>51</sup>

It is implicit that the foreign law and foreign judgment would not offend against our public policy.<sup>52</sup>

45. *Ibid.*, at p. 231 (SCC) (*per* C.K. Thakker, J.)

46. *Sankaran Govindan v. Lakshmi Bharathi*, (1975) 3 SCC 351 at pp. 359-60, 366 AIR 1974 SC 1764 at pp. 1770, 1775

47. *Castriaue v. Behrens*, (1861) 30 LJ QB 163 at p. 168

48. *T. Sundaram Pillai v. Kandaswami Pillai*, AIR 1941 Mad 387 (1941) 1 MLJ 140

49. *Satya v. Teja Singh*, (1975) 1 SCC 120 AIR 1975 SC 105. *Narasimha Rao v. Venkata Lakshmi*, (1991) 3 SCC 451.

50. *Satya v. Teja Singh*, (1975) 1 SCC 120 at p. 138 AIR 1975 SC 105 at pp. 117-18

51. *Ibid.*, see also *Narasimha Rao v. Venkata Lakshmi*, (1991) 3 SCC 451

52. *Satya v. Teja Singh* (1975) 1 SCC 120 AIR 1975 SC 105

## 10. PRESUMPTION AS TO FOREIGN JUDGMENT: SECTION 14

Section 14 of the Code declares that the court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a court of competent jurisdiction, unless the contrary appears on the record, or is proved. However, if for admissibility of such copy any further condition is required to be fulfilled, it can be admitted in evidence only if that condition is satisfied.<sup>53</sup>

Thus, in *Narasimha Rao v. Venkata Lakshmi*<sup>54</sup>, the Supreme Court held that mere production of a photostat copy of a decree of a foreign court is not sufficient. It is required to be certified by a representative of the Central Government in America.

## 11. SUBMISSION TO JURISDICTION OF FOREIGN COURT

It is well-established that one of the principles on which foreign courts are recognised to be internationally competent is voluntary submission of the party to the jurisdiction of such foreign court. The reason behind this principle is that having taken a chance of judgment in his favour by submitting to the jurisdiction of the court, it is not open to the party to turn round when the judgment is against him and to contend that the court had no jurisdiction.<sup>55</sup>

Submission to jurisdiction of a foreign court may be express or implied. Whether the defendant has or has not submitted to the jurisdiction of a foreign court is a question of fact which must be decided in the light of the facts and circumstances of each case.<sup>56</sup>

## 12. FOREIGN JUDGMENT AND RES JUDICATA

A foreign judgment is conclusive as to any matter adjudicated upon by a competent foreign court. Section 13 of the Code in essence enacts a rule of *res judicata* in relation to foreign judgments. Hence, if a foreign

53. *International Woollen Mills v. Standard Wool (U.K.) Ltd.*, (2001) 5 SCC 265; AIR 2001 SC 2134.

54. (1991) 3 SCC 451 at pp 463-64.

55. *Godard v. Gray*, LR (1870) 6 QB 139 at p. 155; 40 LJ QB 62; *R. Viswanathan v. Rukn-ul-Mulk Syed Abdul*, AIR 1963 SC 1 at p. 18; (1963) 3 SCR 22; *Narasimha Rao v. Venkata Lakshmi*, (1991) 3 SCC 451 at p. 463.

56. *Shalig Ram v. Firm Daulat Ram Kundanmal*, AIR 1967 SC 739; (1963) 2 SCR 574; *Ramanathan Chettiar v. Kalimuthu Pillai*, ILR (1914) 37 Mad 163.

judgment is delivered by a court having jurisdiction in the matter, it would operate as *res judicata*.<sup>57</sup>

### 13. CONCLUSIVENESS OF FOREIGN JUDGMENT

As stated above, a foreign judgment is conclusive and will operate as *res judicata* between the parties and privies though not strangers. It is firmly established that a foreign judgment can be examined from the point of view of *competence* but not of *errors*. In considering whether a judgment of a foreign court is conclusive, the courts in India will not require whether conclusions recorded by a foreign court are correct or findings otherwise tenable. In other words, the court cannot go into the merits of the original claim and it shall be conclusive as to any matter thereby directly adjudicated upon between the same parties subject to the exceptions enumerated in clauses (a) to (f) of Section 13.<sup>58</sup>

### 14. IRREGULARITIES NOT AFFECTING FOREIGN JUDGMENT

There is distinction between want of jurisdiction and irregular exercise of jurisdiction. In the former case, a decree passed by the court is nullity and *non est*. In the latter case, the decree is merely irregular or wrong but not without jurisdiction and cannot be ignored.<sup>59</sup>

Once a foreign court has jurisdiction in the matter, the decree passed by it cannot be held to be without jurisdiction.

In *R. Viswanathan v. Rukn-ul-Mulk Syed Abdul*,<sup>60</sup> Shah, J. (as he then was) stated:

In considering whether a judgment of a foreign court is conclusive, the court in India will not inquire whether conclusions recorded thereby are supported by the evidence, or are otherwise correct, because *the binding character of the judgment may be displaced only by establishing that the case fails within one or more of the six clauses of Section 13, and not otherwise.*

(emphasis supplied)

57. *R. Viswanathan v. Rukn-ul-Mulk Syed Abdul*, AIR 1963 SC 1 (1963) 3 SCR 22; *Satya v. Teja Singh*, (1975) 1 SCC 120 AIR 1975 SC 105, *Sankaran Govindan v. Lakshmi Bharathi*, (1975) 3 SCC 351 AIR 1974 SC 1764, see also *infra*, "Conclusiveness of foreign judgment"

58. *R. Viswanathan v. Rukn-ul-Mulk Syed Abdul*, AIR 1963 SC 1 (1963) 3 SCR 22; *Badat and Co. v. East India Trading Co.*, AIR 1964 SC 538 (1964) 4 SCR 19; *Satya v. Teja Singh*, (1975) 1 SCC 120 AIR 1975 SC 105; *Narsimha Rao v. Venkata Lakshmi*, (1991) 3 SCC 451

59. For detailed discussion see *supra* Chap. 1

60. AIR 1963 SC 1 at p. 14 (1963) 3 SCR 22

## 15. JUDGMENT AND REASONS

A foreign judgment is conclusive under Section 13 of the Code, but it does not include reasons in support of the judgment recorded by a foreign court. It cannot, therefore, be held that a foreign judgment would mean reasons recorded by a foreign judge in support of the order passed by him. If that were the meaning of "judgment", the section would not apply to an order where no reasons are recorded.<sup>61</sup>

But as observed by the Supreme Court,<sup>62</sup> Section 13 speaks not only of "judgment" but "any matter thereby directly adjudicated upon". The word "any" clearly shows that all the adjudicative parts of the judgment are equally conclusive.<sup>63</sup>

## 16. EFFECT OF FOREIGN JUDGMENT

A foreign judgment is conclusive as to any matter adjudicated upon between the parties. Such judgment is conclusive, binding and would create *res judicata* between the same parties or between the parties under whom they or any of them claim.<sup>64</sup>

## 17. DOCTRINE OF MERGER

The doctrine of merger does not apply to foreign judgments. It is, therefore, open to the plaintiff despite of foreign judgment in his favour to sue the defendant on the original cause of action and to obtain a decree in his favour.<sup>65</sup>

## 18. ENFORCEMENT OF FOREIGN JUDGMENT

A foreign judgment which is conclusive under Section 13 of the Code can be enforced in India in the following ways:

- (1) By instituting a suit on such foreign judgment, or
- (2) By instituting execution proceedings.

61. *R. Viswanathan v. Rukn-ul-Mulk Syed Abdul*, AIR 1963 SC 1: (1963) 3 SCR 22.

62. *Ibid*, at p. 62 (AIR); see also *Brijlal Ramjidas v. Govindram Gordhandas Seksaria*, (1946-47) 74 IA 203; AIR 1947 PC 192 (194)

63. *Ibid*.

64. For detailed discussion, see *supra*, "foreign judgment and *res judicata*" "Conclusiveness or foreign judgment" and "Binding nature of foreign judgments Principles".

65. *Badat and Co. v. East India Trading Co.*, AIR 1964 SC 538: (1964) 4 SCR 19.

### (1) Suit on foreign judgment

A foreign judgment may be enforced by instituting a suit on such foreign judgment. The general principle of law is that any decision by a foreign court, tribunal or quasi-judicial authority is not enforceable in a country unless such decision is embodied in a decree of a court of that country.<sup>66</sup> In such suit, the court cannot go into the merits of the original claim and it shall be conclusive as to any matter thereby directly adjudicated upon between the same parties. Such a suit must be filed within a period of three years from the date of the judgment.<sup>67</sup>

### (2) Execution proceedings

A foreign judgment may also be enforced by proceedings in execution in certain specified cases mentioned in Section 44-A of the Code. The said section provides that where a certified copy of a decree of any of the superior courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court. When a foreign judgment is sought to be executed under Section 44-A, it will be open to the judgment-debtor to take all objections which would have been open to him under Section 13 if a suit had been filed on such judgment.<sup>68</sup> The fact that out of six exceptions there has been due compliance with some of the conditions and there has been no violation of some of the exceptions is of no avail. *The decree can be executed under Section 44-A only if all the conditions of Section 13(a) to (f) are satisfied.*<sup>69</sup> (emphasis supplied)

## 19. FOREIGN AWARD

An award passed by a foreign arbitrator and enforceable in a country where it was made, can be enforced in India.<sup>70</sup>

## 20. EXECUTION OF FOREIGN JUDGMENT

A foreign judgment which is conclusive and does not fall within the mischief of any of the clauses (a) to (f) of Section 13 of the Code, may be enforced by taking out execution proceedings in India.<sup>71</sup>

66 *Roshanlal v R B Mohan Singh*, (1975) 4 SCC 628 AIR 1975 SC 824

67 Art 101, Limitation Act, 1963.

68 *R M V Veltachi Achi v R M A Ramanathan Chettiar* AIR 1973 Mad 141 (1972) 2 MIJ 468

69 *Ibid.*, at p 146 (AIR) see also *Narhari Shivram v Panna'ul Umichram*, (1976) 3 SCC 203 AIR 1977 SC 164, *Mohanlal v Tribhuvan*, AIR 1963 SC 358 (1963) 2 SCR 707, *Jose Da Costa v Bascera Sadasiva*, (1976) 2 SCC 917 AIR 1975 SC 1843

70 For detailed discussion, see *supra*, "Enforcement of foreign judgment"

71 *Ibid.*

## CHAPTER 4

# Place of Suing

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### 1. GENERAL

Suits may be of different types. They may relate to movable properties or immovable properties; they may be based on contracts or torts; they may be matrimonial proceedings, suits for accounts and so on. The jurisdiction of a court to entertain, deal with and decide a suit may be restricted by a variety of circumstances, and the first thing which is to be determined is the place of suing. The expression "place of suing" simply means the venue for trial and it has nothing to do with the competency of the court. Sections 15 to 20 of the Code of Civil Procedure regulate the forum for the institution of suits.

## 2. SCHEME

Section 15 requires the plaintiff to file a suit in the court of the lowest grade competent to try it. Sections 16 to 18 deal with suits relating to immovable property. Section 19 applies to suits for compensation for wrong to person or to movable property. Section 20 is a residuary section and covers all cases not dealt with by Sections 15 to 19. Section 21 recognises the well-established principle that the defect as to territorial or pecuniary jurisdiction can be waived. It forbids appellate or revisional court to allow objection as to place of suing or pecuniary limits. Section 21-A bars a substantive suit for setting aside a decree passed by a court on the ground of want of territorial jurisdiction.

## 3. PECUNIARY JURISDICTION

### (a) General rule

Every suit shall be instituted in the court of the lowest grade competent to try it.<sup>1</sup> It thus directs the suitor to institute a suit in the court of a lowest grade.

### (b) Nature and scope

Section 15 of the Code refers to the pecuniary jurisdiction of the court. It states that every suit should be instituted in the court of the lowest grade competent to try it.<sup>2</sup> The rule laid down in the section is a rule of procedure and does not affect the jurisdiction of the court. Hence, a decree passed by a court of a higher grade cannot be said to be without jurisdiction.<sup>3</sup> It is merely an irregularity covered by Section 99 of the Code and the decree passed by the court is not a nullity.<sup>4</sup>

### (c) Object

The object underlying this provision is twofold,<sup>5</sup>

- (i) to see that the courts of higher grades shall not be overburdened with suits; and

1. S 15

2. S 15, see also *Nidhi Lal v Mazhar Husain*, ILR (1885) 7 All 230 1885 All WN 1 (FB). *Balgonda v Ramgonda*, (1969) 71 Bom LR 582

3. *Gopal v Shamrao*, AIR 1941 Nag 21, *Konthan Kesavan v Varkey Thomman*, AIR 1964 Ker 206

4. *Kirm Singh v Chaman Paswan*, AIR 1954 SC 340 (1955) 1 SCR 117 see also S 21(2)

5. *Nidhi Lal v Mazhar Husain*, ILR (1885) 7 All 230 at p 234 1885 All WN 1 (FB) *Atman Singh v Lajva Ram*, AIR 1956 Punj 188 *Union of India v Ladulal Jam*, AIR 1963 SC 1681 at p 1683 (1964) 3 SCR 624

- (ii) to afford convenience to the parties and witnesses who may be examined in such suits.

Thus, Bombay, Calcutta and Madras High Courts are having original jurisdiction like City Civil Courts and Small Causes Courts. The pecuniary jurisdiction of a Small Causes Court is, say, up to Rs 50,000. Therefore, a suit to recover Rs 5000 as damages for breach of contract can be tried by any of the courts. But according to Section 15 of the Code, the suit must be filed<sup>6</sup> in the lowest court, i.e., in the Small Causes Court. But if the suit is filed in the City Civil Court and the decree is passed by that court, it is not a nullity.

#### (d) Mode of valuation

*Prima facie*, it is the plaintiff's valuation in the plaint that determines the jurisdiction of the court and not the amount for which ultimately the decree may be passed by the court. Thus, if the pecuniary jurisdiction of the court of the lowest grade is, say, Rs 10,000 and the plaintiff files a suit for accounts and finally the court finds on taking the accounts that Rs 15,000 are due, the court is not deprived of its jurisdiction to pass a decree for that amount.

In the case of *Kiran Singh v. Chaman Paswan*<sup>7</sup>, a suit was valued at Rs 2950 and was filed in the court of the Subordinate judge, Monghyr. The suit was dismissed and the plaintiff filed an appeal in the District Court. That appeal was also dismissed by the District Court and the Second Appeal was filed in the High Court of Patna. The High Court held that the correct valuation was Rs 9880 and directed the appellant to pay the deficit court fees. On the revised valuation, the suit would be within the competence of the Subordinate judge, where it was filed but an appeal against the decree would lie directly to the High Court and not to the District Court. The appellant, in these circumstances, contended before the High Court that the appeal to the District Court was incompetent and the decree passed by the District Court was a nullity and that the Second Appeal should be treated and heard as a First Appeal. The High Court negatived the contention and dismissed the appeal as no prejudice was shown.<sup>8</sup> The matter was taken to the Supreme Court. While affirming the decision of the High Court, the Supreme Court held that the decree passed by the District Court was not a nullity and that a mere change of forum cannot be said to have

6. We have preferred to use the simple and more common expression "to file" instead of "to institute" used in the Code.

7. AIR 1954 SC 340: (1955) 1 SCR 117; see also *Commercial Aviation & Travel Co. v. Vimla Pannalal*, (1988) 3 SCC 423: AIR 1988 SC 1636.

8. S. A. 1152 of 1946, decided on 19-7-1950 (Pat).

caused prejudice to the appellant. The decree passed by the District Court was, therefore, upheld.

### (e) Power and duty of court

Usually, a court will accept a valuation of the plaintiff in the plaint and proceed to decide the suit on merits on that basis.

That does not, however, mean that the plaintiff in all cases is at liberty to assign any arbitrary value to the suit, and to choose the court in which he wants to file a suit. If the plaintiff deliberately undervalues or overvalues the claim for the purpose of choosing the forum, the plaint cannot be said to be correctly valued and it is the duty of the court to return it to be filed in the proper court. If it appears to the court that the valuation is falsely made in the plaint for the purpose of avoiding the jurisdiction of the proper court, the court may require the plaintiff to prove that the valuation is proper.<sup>9</sup> "When there is an objective standard of valuation, to put a valuation on the relief ignoring such objective standard might be a demonstratively arbitrary and unreasonable valuation and the court would be entitled to interfere in the matter."<sup>10</sup> But if the court is unable to come to a finding regarding the correct valuation of the relief, the court has to accept the valuation of the plaintiff.<sup>11</sup>

Again, a court can pass a decree for an amount exceeding the pecuniary limits of its jurisdiction. This is based on the principle that once the court is seized of the matter, it does not lose jurisdiction by the amount finally ascertained in the suit, though a contrary view has also been taken.<sup>12</sup>

### (f) Objection as to jurisdiction<sup>13</sup>

## 4. TERRITORIAL JURISDICTION

### (a) Types of suits

For the purpose of territorial jurisdiction of a court, suits may be divided into four classes, viz.:

9 Or 7 R. 10 See also *Balgonda v Ramgonda*, (1969) 71 Bom LR 582

10 *Tara Devi v Sri Thakur Radha Krishna Maharaj*, (1987) 4 SCC 69 AIR 1987 SC 2085  
*Abdul Hamid v Abdul Mand*, (1988) 2 SCC 575 AIR 1988 SC 1150

11 *Commercial Aviation & Travel Co v Vimla Pannalal*, (1988) 3 SCC 423 AIR 1988 SC 1636

12 For detailed discussion and case law see *Authors' Code of Civil Procedure (Lawyers' Edn)* Vol. I at pp. 363-65

13 For detailed discussion see *infra* under that head

- (a) Suits in respect of immovable property;
- (b) Suits for movable property;
- (c) Suits for compensation for wrong (tort); and
- (d) Other suits.

### (b) Immovable property: Sections 16-18

Sections 16 to 18 deal with suits relating to immovable property. Clauses (a) to (e) of Section 16 deal with the following five kinds of suits, viz.:

- (i) Suits for recovery of immovable property;
- (ii) Suits for partition of immovable property;
- (iii) Suits for foreclosure, sale or redemption in case of mortgage of or charge upon immovable property;
- (iv) Suits for determination of any other right to or interest in immovable property; and
- (v) Suits for torts to immovable property.

These suits must be filed in the court within the local limits of whose jurisdiction the property is situate. This is very clear and simple and does not create any difficulty. But what will happen if the property is situate within the jurisdiction of more than one court? Section 17 of the Code provides for this contingency. It says that where a suit is to obtain a relief respecting, or damage for torts to, immovable property situate within the jurisdiction of different courts, the suit can be filed in the court within the local limits of whose jurisdiction any portion of the property is situate provided that the suit is within the pecuniary jurisdiction of such court. This provision is intended for the benefit of suitors and to prevent multiplicity of suits.

A case may, however, arise where it is not possible to say with certainty that the property is situate within the jurisdiction of the one or the other of several courts. In such a case, one of these courts, if it is satisfied that there is such uncertainty, may after recording a statement to that effect proceed to entertain and dispose of the suit.<sup>14</sup>

### (c) Movable property: Section 19

It has been said, movables follow the person (*Mobilia sequuntur personam*).

A suit for wrong to movable property may be brought at the option of the plaintiff either at the place where the wrong is committed or where the defendant resides, carries on business or personally works for gain.

Where such wrong consists of a series of acts, a suit can be filed at any place where any of the acts has been committed. Similarly, where a wrongful act is committed at one place and the consequences ensue

at another place, a suit can be instituted at the option of the plaintiff where the action took place or consequences ensued.

*Illustrations*

- (i) A, residing in Delhi, beats B in Calcutta. B may sue A either in Calcutta or in Delhi.
- (ii) A, residing in Delhi, publishes in Calcutta statements defamatory to B. B may sue A either in Calcutta or in Delhi.
- (iii) A, residing in Delhi, publishes in Calcutta statements defamatory to B. The newspaper is circulated in Bombay, Madras and Raipur. B may sue A either in Calcutta, or in Delhi, or in Bombay, or in Madras, or in Raipur.

**(d) Compensation for wrong: Section 19**

A suit for compensation for wrong (tort) to a person may be instituted at the option of the plaintiff either where such wrong is committed, or where the defendant resides, carries on business or personally works for gain.<sup>15</sup>

**(e) Other suits: Section 20**

Section 20 provides for all other cases not covered by any of the foregoing rules. All such suits may be filed at the plaintiff's option in any of the following courts, viz.:

- (i) Where the cause of action, wholly or partly arises; or
- (ii) Where the defendant resides, or carries on business or personally works for gain; or
- (iii) Where there are two or more defendants, any of them resides or carries on business or personally works for gain, provided that in such case (a) either the leave of the court is obtained; or (b) the defendants who do not reside or carry on business or personally work for gain at that place acquiesce in such institution.

*Illustrations*

(a) A is a tradesman in Calcutta. B carries on business in Delhi. B, by his agent in Calcutta, buys goods of A and requests A to deliver them to the East India Railway Company. A delivers the goods accordingly in Calcutta. A may sue B for the price of the goods either in Calcutta where the cause of action has arisen, or in Delhi, where B carries on business.

(b) A resides at Simla, B at Calcutta and C at Delhi. A, B and C being together at Banaras, B and C make a joint promissory note payable on demand, and deliver it to A. A may sue B and C at Banaras, where the cause of action arose. He may also sue them at Calcutta, where B resides,

<sup>15</sup> For detailed discussion, see *supra*, "Movable property"

or at Delhi, where C resides; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the court.

Section 20 of the Code has been designed to secure that justice might be brought as near as possible to every man's hearthstone and that the defendant should not be put to the trouble and expense of travelling long distances in order to defend himself in cases in which he may be involved.<sup>16</sup>

#### (f) Selection of forum

It is a well-settled principle of law that consent can neither confer nor take away jurisdiction of a competent court. The same principle applies to ouster of jurisdiction of a court. Where the court has jurisdiction, neither consent, nor waiver, nor estoppel, nor acquiescence can oust it. An agreement to oust *absolutely* the jurisdiction of a competent court is void, being against public policy<sup>17</sup> (*Ex dolo malo non oritur actio*).

But when two or more courts have jurisdiction to entertain a suit, an agreement by the parties to submit to the jurisdiction of one of such courts to the exclusion of the rest is valid, binding and enforceable.<sup>18</sup>

### 5. JURISDICTION AS TO SUBJECT-MATTER

Different courts have been empowered to decide different types of suits. Certain courts have no jurisdiction to entertain certain suits. For instance, the Presidency Small Cause Court has no jurisdiction to try a suit for specific performance of a contract. Likewise, suits for testamentary succession, divorce cases, probate proceedings, insolvency matters, etc. cannot be entertained by a Court of Civil judge (Junior Division). This is called jurisdiction as to the subject-matter of the suit.<sup>19</sup>

Where a court has no jurisdiction over the subject-matter of a suit, there is inherent lack of jurisdiction and a decree passed, judgment rendered or order made is a nullity.<sup>20</sup>

16. *Laxman Prasad v. Prodigy Electronics Ltd.*, (2008) 1 SCC 618 at p. 627: AIR 2008 SC 685; *Mohan Singh v. Lajya Ram*, AIR 1956 Punj 188; *Union of India v. Ladulal Jain*, AIR 1963 SC 1681 at p. 1683; (1964) 3 SCR 624.

17. For detailed discussion, see *supra*, Chap. 1

18. *Hakam Singh v. Gammon (India) Ltd.*, (1971) 1 SCC 286: AIR 1971 SC 740; *Globe Transport Corpn. v. Triveni Engg. Works*, (1983) 4 SCC 707; *A B C. Laminart (P) Ltd. v. A.P. Agencies*, (1989) 2 SCC 163: AIR 1989 SC 1239; *Patel Roadways Ltd. v. Prasad Trading Co.*, (1991) 4 SCC 270: AIR 1992 SC 1514; *Angile Insulations v. Davy Ashmore India Ltd.*, (1995) 4 SCC 153: AIR 1995 SC 1766, *Lee v. Showmen's Guild of Great Britain*, (1952) 2 QB 329; (1952) 1 All ER 1175 (CA); *Laxman Prasad v. Prodigy Electronics Ltd.*, (2008) 1 SCC 618.

19. For detailed discussion, see *supra*, Chap. 1

20. For detailed discussion, see *infra*, "Objection as to jurisdiction".

## 6. PLACE OF SUING: GENERAL PROVISIONS

The provisions of the Code of Civil Procedure relating to the place of suing may be explained by the following chart:

<i>Nature of Suit</i>	<i>Place of Suing</i>
1. Every Suit	— Court of the lowest grade competent to try it (Section 15)
2. Suits for (i) Recovery of; (ii) Partition of; (iii) Foreclosure, sale or redemption of mortgage of or charge upon; (iv) Determination of any other right to or interest in; (v) Compensation for wrong to immovable property—	— Court within whose jurisdiction the immovable property is situate [Section 16(a) to (e)]
3. Recovery of movable property under actual distraint or attachment—	— Court within whose jurisdiction the immovable property is situate [Section 16(f)]
4. (i) Relief respecting; or (ii) Compensation for wrong to— — immovable property held by or on behalf of the defendant where the relief sought can be entirely obtained through his personal obedience—	Court within whose jurisdiction— (i) the property is situate; or (ii) the defendant resides, or carries on business or personally works for gain (Proviso to Section 16) <sup>a</sup>
5. (i) Relief respecting; or (ii) Compensation for wrong to— — immovable property situate within the jurisdiction of different courts—	— Court within whose jurisdiction any portion of the property is situate, provided that the entire claim is within the pecuniary jurisdiction of such court (Section 17)
6. Where it is uncertain within the jurisdiction of which of two or more courts any immovable property is situate—	— Any of those courts, provided that the court has pecuniary jurisdiction and jurisdiction as regards the subject matter of the suit (Section 18)
7. Compensation for wrong to— (i) person, or (ii) movable property— — if the wrong is done within the jurisdiction of one court and the defendant resides or carries on business or personally works for gain within the jurisdiction of another court—	— In either of the courts at the option of the plaintiff (Section 19)
8. Any other suit—	(i) Where the cause of action wholly or partly arises, or (ii) the defendant resides, carries on business or personally works for gain, or (iii) where there are two or more defendants, where any one of them resides, carries on business or personally works for gain, provided that—

Contd.

Nature of Suit	Place of Suing
	(a) either the leave of the court is obtained, or (b) the defendants, who do not reside, carry on business or personally work for gain acquiesce (Section 20)

This provision is based on the well-known maxim, *Equity acts in personam*. See observation of Lord Selborne in *Ewing v Ewing*, (1883) 9 AC 34 at p. 40.

## 7. FORUM SHOPPING

The Supreme Court has not only disapproved but strongly deprecated the practice and increasing tendency on the part of the litigants of crossing a forum which may oblige them by entertaining suits or petitions though they have no jurisdiction in the matter.

In *Union of India v. Oswal Woollen Mills Ltd.*,<sup>21</sup> though the registered office of the company was at Ludhiana (Punjab), a petition was filed against it in High Court of Calcutta and *ex parte* ad interim relief was obtained by the petitioner. The Supreme Court set aside the order and observed that the action was taken as a part of manoeuvring legal battle.

In *Morgan Stanley Mutual Fund v. Kartick Das*,<sup>22</sup> the Supreme Court stated, "There is an increasing tendency on the part of litigants to indulge in speculative and vexatious litigation and adventurism which the fora seem readily to oblige. We think such a tendency should be curbed." (emphasis supplied)

In *ONGC v. Utpal Kumar Basu*,<sup>23</sup> though no cause of action had arisen in Calcutta, the High Court entertained a writ petition and granted interim relief to the petitioner.

Observing that it was a "a great pity" that one of the premier High Courts had developed a tendency to assume jurisdiction on unsustainable grounds, the Supreme Court said:

"We are greatly pained to say so but if we do not strongly deprecate the growing tendency we will, we are afraid, be failing in our duty to the institution and the system of administration of justice. We do hope that we will not have another occasion to deal with such a situation"<sup>24</sup>

(emphasis supplied)

21. (1984) 2 SCC 646: AIR 1984 SC 1264.

22. (1994) 4 SCC 225 at p. 246.

23. (1994) 4 SCC 711.

24. *Ibid*, at p. 722 (SCC); see also *State of Rajasthan v. Swatika Properties*, (1985) 3 SCC 217: AIR 1985 SC 1289; *Bloom Dekor Ltd. v. Subhash Himatlal Desai*, (1994) 6 SCC 322. For detailed discussion, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. I at pp. 481-87.

## 8. OBJECTION AS TO JURISDICTION: SECTION 21

### (a) General

As stated above,<sup>25</sup> it is a fundamental rule that a decree of a court without jurisdiction is a nullity. Halsbury<sup>26</sup> rightly states:

"Where by reason of any limitation imposed by statute, charter or commission, a court is without jurisdiction to entertain any particular action or matter, neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the court nor can consent give a court jurisdiction if a condition which goes to the root of the jurisdiction has not been performed or fulfilled... . Where a court takes upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing."<sup>27</sup>

(emphasis supplied)

This does not, however, apply to territorial or pecuniary jurisdiction, inasmuch as objections to such jurisdiction are regarded by the Code as merely technical and, unless raised at the earliest possible opportunity, they will not be entertained in appeal or revision for the first time.<sup>28</sup>

### (b) Object

The object underlying Section 21 is to protect honest litigants and to avoid harassment to plaintiffs who have *bona fide* and in good faith initiated proceedings in a court which is later on found to be wanting in jurisdiction. Dishonest litigants cannot take advantage of this provision.<sup>29</sup>

### (c) Objection as to territorial jurisdiction

It is well-settled that the objection as to local or territorial jurisdiction of a court (place of suing) does not stand on the same footing of a court to try the case. Competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand, an objection as to the local jurisdiction

25 For detailed discussion, *see supra*, Chap. 1

26 Halsbury's Laws of England (2nd Edn.) Vol. VIII, Art. 1178 at p. 532. *Harshad Chiman Lal v DLF Universal Ltd.*, (2005) 7 SCC 791.

27 See also, *United Commercial Bank Ltd v Workmen*, AIR 1951 SC 230 at p. 237, 1050 SCR 380, *Kiran Singh v. Chaman Paswan*, AIR 1954 SC 340, *Hira Lal v Kali Nath*, AIR 1962 SC 199

28 *Hira Lal v Kali Nath*, AIR 1962 SC 199, *Kiran Singh v Chaman Paswan*, AIR 1954 SC 340

29 *ONGC v Utpal Kumar Basu*, (1994) 4 SCC 711 at p. 723, *Morgan Stanley Mutual Fund v Kartick Das*, (1994) 4 SCC 225, *Bloom Dekor Ltd v Subhash Himattal Desai* (1994) 6 SCC 322 at p. 328

of a court can be waived and this principle has been recognised by Section 21 of the Code.

Thus, in *Hira Lal v. Kali Nath*<sup>30</sup>, where the suit which ought to have been filed in an Agra court was filed in the Bombay High Court with the leave of the court, it was held that the objection to such jurisdiction falls within Section 21.

Under Section 21(1), no objection as to the place of suing will be allowed by an appellate or revisional court unless the following three conditions are satisfied:<sup>31</sup>

- (i) The objection was taken in the court of first instance;
- (ii) It was taken at the earliest possible opportunity and in cases where issues are settled at or before settlement of issues; and
- (iii) There has been a consequent failure of justice.

*All these three conditions must coexist.*<sup>32</sup> (emphasis supplied)

The reason is obvious. It is well-settled that neither consent nor waiver nor acquiescence can confer jurisdiction upon a court otherwise incompetent to try a suit. However, it is equally well-settled that the objection as to the local jurisdiction of a court does not stand on the same footing as an objection to the competence of a court to try a case. Competence of a court to try a case goes to the very root of jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand, an objection as to the local jurisdiction of a court can be waived.<sup>33</sup> Section 21 is a statutory recognition of the said principle and provides that the defect as to the place of suing under Sections 15 to 20 may be waived. If the defendant allows the trial court to proceed to decide the matter without raising an objection as to the place of suing and takes the chance of a verdict in his favour, he clearly waives the objection, and will not be subsequently permitted to raise it. It is even possible to say that long and continued participation by the defendant in the proceedings without any protest may, in an appropriate case, amount to a waiver of an objection.<sup>34</sup>

The policy underlying Section 21 has been succinctly explained by the Supreme Court in *Kiran Singh v. Chaman Paswan*<sup>35</sup>, wherein their Lordships observed:

30. AIR 1962 SC 199 at p. 201: (1962) 2 SCR 747.

31. *Pathumma v. Kuntalan Kuttu*, (1981) 3 SCC 589. AIR 1981 SC 1683, *R S DV Finance Co (P) Ltd. v. Shree Vallabh Glass Works Ltd.*, (1993) 2 SCC 130: AIR 1993 SC 2094.

32. *Ibid.*, at p. 591 (SCC): at p. 1684 (AIR), see also *Mantoo Sarkar v. Oriental Insurance Co Ltd.*, (2009) 2 SCC 244.

33. *Hira Lal v. Kali Nath*, AIR 1962 SC 199 at p. 201: (1962) 2 SCR 747.

34. *Bahrein Petroleum Co. Ltd. v. P.J. Pappu*, AIR 1966 SC 634 at p. 636. (1966) 1 SCR 461.

35. AIR 1954 SC 340 at p. 342. (1955) 1 SCR 117. See also *Bahrein Petroleum Co. Ltd. v. P.J. Pappu*, AIR 1966 SC 634: (1966) 1 SCR 461.

"[W]hen a case had been tried by a court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections to both territorial and pecuniary jurisdictions as technical and not open to consideration by an appellate court, unless there has been a prejudice on merits"<sup>36</sup>

But the section does not preclude objections as to the place of suing being taken in the appellate or revisional court, if the trial court has not decided the suit on merits.<sup>37</sup>

#### (d) Objection as to pecuniary jurisdiction

As discussed above, as a general rule, it is the plaintiff's valuation in the plaint that determines the jurisdiction of the court and not the amount for which ultimately the decree may be passed by the court. But if the defendant disputes the valuation put by the plaintiff, it is the duty of the trial court to inquire into it and to pass an appropriate order. But no objection as to overvaluation or undervaluation will be allowed by any appellate or revisional court unless the following three conditions exist:

- (i) The objection was taken in the court of first instance;
- (ii) It was taken at the earliest possible opportunity and in cases where issues are settled, at or before settlement of issues; and
- (iii) There has been a consequent failure of justice.

*All these three conditions must coexist.*<sup>38</sup> (emphasis supplied)

#### Illustration

A files a suit against B to recover possession of a house. He values his claim in the plaint at Rs 8000. The suit is filed in court C, which has jurisdiction to try suits of a value up to Rs 10,000. The market value of the house is Rs 12,000, but B does not object to the jurisdiction of the court. The decree is passed in favour of A. In appellate court, B cannot take the objection about the pecuniary jurisdiction of court C.

Thus, in *Kiran Singh v. Chaman Paswan*<sup>39</sup>, negating the contention of the appellant that a mere change of forum can be said to have caused prejudice to him, the Supreme Court rightly observed:

"If the fact of an appeal being heard by a Subordinate Court or District Court where the appeal would have laid to the High Court if the correct

36 *Kiran Singh v Chaman Paswan*, AIR 1954 SC 340 at p. 342 (AIR), *Bahrain Petroleum Co Ltd v P J Pappu*, AIR 1966 SC 634 at p. 637 (AIR), *Subhash v Nemasa* (2007) 13 SCC 650; AIR 2007 SC 1828.

37 *Pathumma v Kuntalan Kuttu* (1981) 3 SCC 589; AIR 1981 SC 1683; *R S DV Finance Co (P) Ltd v Shree Vallabh Glass Works Ltd.* (1993) 2 SCC 130; AIR 1993 SC 2094.

38 (1981) 3 SCC 589, 591.

39 AIR 1954 SC 340 at p. 342; (1955) 1 SCR 117.

valuation had been given, is itself a matter of prejudice, then the decree passed by the Subordinate Court must, without more, be liable to set aside, and the words 'unless the overvaluation or undervaluation thereof has prejudicially affected the disposal of the suit or appeal on its merits' would become wholly useless. These words clearly show that the decrees passed in such cases are liable to be interfered with in an appellate court, not in all cases and as a matter of course, but only if prejudice such as is mentioned in the section results. And *the prejudice envisaged by that section therefore must be something other than the appeal being heard in a different forum.*"<sup>40</sup> (emphasis supplied)

Whether there has been prejudice or not, is a matter to be determined on the facts of each case.<sup>41</sup>

### (e) Objection as to subject-matter of jurisdiction

A court cannot adjudicate upon a subject-matter, which does not fall within its province as limited or defined by law. A jurisdiction as to the subject-matter of a suit is regarded as essential, for jurisdiction over the subject-matter is a condition precedent or a *sine qua non* to the acquisition of authority over the parties and the matter, and if the court does not possess that jurisdiction, a judgment given, order made or decree passed is absolutely null and void, which may be set aside in appeal, review or revision. Its validity can be challenged even in collateral proceedings.<sup>42</sup>

### (f) Objection in execution proceedings

Sub-section (3) of Section 21 makes it clear that the principles of this section apply to execution proceedings also.<sup>43</sup>

## 9. EXECUTION PROCEEDINGS

The question of objection as to jurisdiction of the court in execution proceedings can be discussed under two heads;

- (a) Position prior to Amendment Act, 1976; and
- (b) Position after Amendment Act, 1976.

40. *Kiran Singh v. Chaman Paswan*, AIR 1954 SC 340 at p. 342. (1955) 1 SCR 117

41. *Ibid*, at p. 344 (AIR). at p. 126 (SCR); see also *Subhash v. Nemasa*, (2007) 13 SCC 650.

42. *Hriday Nath v. Ram Chandra*, AIR 1921 Cal 34; ILR (1921) 48 Cal 138 (FB) ; *Official Trustee v. Sachindra Nath*, AIR 1969 SC 823. (1969) 3 SCR 92; *Harshad Chiman Lal v DLF Universal Ltd.*, (2005) 7 SCC 791. For detailed discussion, see *supra*, Chap. 1

43. For detailed discussion, see *infra*, "Execution proceedings".

### (a) Position prior to Amendment Act, 1976

Section 21 of the Code as originally enacted, did not, in terms apply to execution proceedings. There was, therefore, a difference of opinion whether the principle of Section 21 would govern execution proceedings also. No doubt in *Hira Lal v. Kali Nath*<sup>44</sup>, the Supreme Court applied the principle of Section 21 to execution proceedings.

### (b) Position after Amendment Act, 1976

With a view to avoiding delay in execution proceedings, an express provision has been made in the Code by the Code of Civil Procedure (Amendment) Act, 1976, which specifically provides that an objection as to territorial jurisdiction of a court executing the decree should not be allowed unless the condition laid down therein are fulfilled.<sup>45</sup>

## 10. BAR OF SUIT: SECTION 21-A

It is clear from the above discussion that as per Section 21, no objection to the place of suing can be taken at an appellate or revisional stage of the proceedings. But can that decision be challenged by filing a new suit? There were conflicting decisions on that point.

Section 21-A, as inserted by the Amendment Act of 1976, now specifically provides that no substantive suit can be filed to set aside a decree passed by a court on an objection as to the place of suing.<sup>46</sup>

The provision, however, is ambiguous, defective and incomplete. It speaks of place of suing (territorial limits) only and does not deal with pecuniary limits or defects. It is, however, submitted that the principle applicable to territorial defects will *pro tanto* apply to pecuniary defects as well.<sup>47</sup>

## 11. GENERAL PRINCIPLES

From the relevant provisions of the Code and various decisions of the Supreme Court, the following principles regarding place of suing emerge:

44 AIR 1962 SC 199 at p. 201 (1962) 2 SCR 747

45 Sub-s (3) of S. 21, see also, "Statement of Objects and Reasons", Gazette of India, Extra, Pt II S. 2 dt 08-04-1974, at p. 301

46 Statement of Objects and Reasons, Clause 9, Gazette of India, dt. 8-4-1974, Pt II S. 2, Extra, at p. 301

47 For detailed discussion and analytical comment, see, Authors' *Code of Civil Procedure* (Lawyers' Edn.) Vol. I at pp. 480-535

- (1) Every suit should be instituted in the court of the lowest grade competent to try it.
- (2) The court of the higher grade is not deprived of the jurisdiction to try such suit.
- (3) Once the suit is properly instituted, the court has power to pass a decree exceeding its pecuniary jurisdiction.
- (4) Suits relating to immovable property should be instituted where the property is situated.
- (5) Suits relating to movable property or wrong to a person may be instituted where such wrong is committed or where the defendant resides, carries on business or works for gain.
- (6) Other suits may be instituted (a) where the cause of action, wholly or partly arises; or (b) where the defendant resides, carries on business or works for gain; or (c) where there are two or more defendants and some of them reside outside the jurisdiction of the court, carries on business or works for gain, a suit may be instituted at the place where one of them resides, carries on business or personally works for gain, provided that the leave of the court is obtained.
- (7) Consent can neither confer nor take away jurisdiction of a competent court.
- (8) Where two or more courts have jurisdiction to entertain a suit, and the parties agree to submit to jurisdiction of one of such courts, the agreement is legal, valid, binding and enforceable.
- (9) No objection as to territorial or pecuniary jurisdiction can be entertained by appellate or revisional court unless (a) such objection has been taken at the earliest possible opportunity; and (b) there has been a consequent failure of justice.
- (10) No objection as to territorial (or pecuniary) jurisdiction can be entertained by executing court unless (a) such objection has been taken at the earliest possible opportunity; and (b) there has been a consequent failure of justice.
- (11) No suit would lie to set aside a decree on objection as to territorial (or pecuniary) jurisdiction of a court.

# CHAPTER 5

## Institutions of Suit

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## 1. GENERAL

Sections 26 to 35-B and Orders 1 to 20 of the (First) Schedule deal with the procedure relating to suits. Orders 1, 2, and 4 provide for parties to suit, frame of suit and institution of suit

## 2. SUIT: MEANING

The term "suit" has not been defined in the Code. According to the dictionary meaning, "suit" is a generic term of comprehensive signification referring to any proceeding by one person or persons against another or others in a court of law wherein the plaintiff pursues the remedy which the law affords him for the redress of any injury or the enforcement of a right, whether at law or in equity.<sup>1</sup>

Ordinarily, a suit is a civil proceeding instituted by the presentation of a plaint.<sup>2</sup>

## 3. ESSENTIALS OF SUIT

There are four essentials of a suit<sup>3</sup>

- (i) Opposing parties;
- (ii) Subject-matter in dispute;
- (iii) Cause of action; and
- (iv) Relief

1. *Chamber's 20th Century Dictionary* (1983) at p. 1234, *Black's Law Dictionary* (1990) at p. 1434; *New Oxford Dictionary of English* (1998) at p. 1044.
2. S. 26, see also *Hansraj Gupta v. Official Liquidators of The Dehra Dun-Mussoorie Electric Tramway Co. Ltd.*, (1932-33) 60 IA 13. AIR 1933 PC 63, *Pandurang Ramchandra v Shantibai Ramchandra*, 1989 Supp (2) SCC 627 at p 639; AIR 1989 SC 2240 at p 2248
3. *Krishnappa Bin. Shivappa Bin.*, ILR (1907) 31 Bom 395 at p. 398 (*per* Sir Lawrence Jenkins, C.J.); see also *Uma Shanker v. Shalig Ram*, AIR 1975 All 36 at pp 45-46 1974 All LJ 793 (FB).

## 4. PARTIES TO SUIT: ORDER 1

### (a) General

Order 1 deals with the parties to a suit, the first essential of a suit. It also contains provisions for addition, deletion and substitution of parties, joinder, misjoinder and non-joinder of parties and objection as to misjoinder and non-joinder. It also to some extent, deals with joinder of causes of action. A provision is also made for "representative suit".

### (b) Complaint: Meaning

The term "complaint" is not defined in the Code. It may, however, be described as "a private memorial tendered to a court in which the person sets forth his cause of action, the exhibition of an action in writing."<sup>4</sup>

### (c) Joinder of parties

The question of joinder of parties may arise either as regards the plaintiffs or as regards the defendants. An act may be done by a single individual and may adversely affect another individual. In that case, the question of joinder of parties does not arise. Thus, where A assaults B, the latter may sue A for tort, as it individually affects him. The question of joinder of parties arises only when an act is done by two or more persons or it affects two or more persons. Thus, if A assaults B and C, or A and B assault C, the question of joinder of plaintiffs or defendants arises.

#### (i) Joinder of plaintiffs: Rule 1

Rule 1 provides for joinder of plaintiffs. It states that all persons may be joined in one suit as plaintiffs if the following two conditions are satisfied:

- (i) the right to relief alleged to exist in each plaintiff arises out of the same act or transaction; and
- (ii) the case is of such a character that, if such persons brought separate suits, any common questions of law or fact would arise.<sup>5</sup>

The word "and" between clauses (a) and (b) makes it clear that both the above conditions should be fulfilled.<sup>6</sup>

4 *Assan v Pathumma*, ILR (1899) 22 Mad 494, *Grija Bai v A Thakur Das*, AIR 1967 Mys 217 at p. 219.

5 R 1.

6 *Stroud v Lawson*, (1998) 2 QB 44, 97 LJ QB 718, *Sudhansu Sekhar v State of W B*, AIR 1972 Cal 320, *Krishna Laxman v Narsimgarao Vitharao*, AIR 1973 Bom 358 (1973) 75 Bom LR 29.

The primary object of Rule 1 is to avoid multiplicity of proceedings and unnecessary expenses.<sup>7</sup>

#### *Illustrations*

1. A enters into an agreement jointly with B and C to sell 100 tins of oil. A thereafter refuses to deliver the goods. Here both, B and C, have each of them a right to recover damages from A. The said right arises out of the same transaction, namely, the breach of agreement; and common questions of law and fact would also arise. B and C, therefore, may file a suit jointly as plaintiffs against A for damages.

2. An altercation takes place between A on the one hand and B and C on the other. A assaults B and C simultaneously. B and C may join as plaintiffs in one suit for damages against A for that tortious act since both the above conditions are fulfilled.

3. A agrees to sell and deliver 100 tins of oil to B at a particular rate on 1st January 1991. He also agrees to sell and deliver a like quantity of oil on the same day at the same price to C. B and C cannot join as plaintiffs in one suit against A as the transactions are different.

#### (ii) Joinder of defendants: Rule 3

Rule 3 provides for joinder of defendants. It states that all persons may be joined in one suit as defendants if the following two conditions are satisfied:

- (i) the right to relief alleged to exist against them arises out of the same act or transaction; and
- (ii) the case is of such a character that, if separate suits were brought against such persons, any common question of law or fact would arise.<sup>8</sup>

The word "and" makes it clear that both the conditions are cumulative and not alternative.<sup>9</sup>

The underlying object of Rule 3 is to avoid multiplicity of suits and needless expenses.<sup>10</sup> The provision, hence, should be construed liberally.<sup>11</sup>

#### *Illustrations*

1. There is a collision between a bus and a car. The bus belongs to B and the car belongs to C. As a result of the collision, A, a passer-by is injured. A may join B and C as defendants in one suit for damages for injuries caused

7. *Iswar Bhai v. Harihar Behera*, (1999) 3 SCC 457 at p. 461; AIR 1999 SC 1341.

8. R. 3.

9. *Stroud v. Lawson*, (1998) 2 QB 44; *Sant Singh v. Deo Ram*, AIR 1974 P&H 276 (CA); *C.S. Govindaraja v. Alagappa Thambiran*, AIR 1926 Mad 911; 51 MLJ 194; 97 IC 212 (FB).

10. *Iswar Bhai v. Harihar Behera*, (1999) 3 SCC 457 at p. 461; AIR 1999 SC 1341; *State Bank of Patiala v. Hypine Carbons Ltd.*, AIR 1990 HP 10.

11. *State Bank of Patiala v. Hypine Carbons Ltd.*, AIR 1990 HP 10.

to him by negligence on the part of both of them or any one of them, since the case involves common questions of fact arising out of the same act, namely, collision of two vehicles.

2. An altercation takes place between A on the one hand and B and C on the other. B and C simultaneously assault A. A may join B and C as defendants in one suit for damages for that tortious act as both the above conditions are fulfilled.

3. B, C, D and E each separately entered into an agreement with A to supply 100 tins of oil. They failed to supply the goods. A cannot join B, C, D and E as defendants in one suit for damages inasmuch as there are four distinct contracts and, therefore, four different transactions.

The plaintiff may join in one suit all or any of the persons severally or jointly and severally liable on any contract.<sup>12</sup> Similarly, where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in one suit.<sup>13</sup>

Where it appears to the court that any joinder of plaintiffs or defendants may embarrass or delay the trial of the suit, it may pass an order for separate trials.<sup>14</sup> Similarly, the court may give judgment for one or more of the plaintiffs as may be found entitled to relief against one or more of the defendants as may be found liable.<sup>15</sup>

#### (d) Necessary and proper parties

There is an essential distinction between a necessary party and a proper party to a suit. A necessary party is one whose presence is indispensable to the constitution of the suit, against whom the relief is sought and without whom no effective order can be passed. A proper party is one in whose absence an effective order can be passed, but whose presence is necessary for a complete and final decision on the question involved in the proceeding.<sup>16</sup> In other words, in absence of a necessary party no decree can be passed, while in absence of a proper party a decree can be passed so far as it relates to the parties before the court.

12. R 6.

13. R 7. See also, illustration 1 (above).

14. Rr 2 and 3-A.

15. R 4.

16. *United Provinces v. Atiq Begum*, AIR 1941 FC 16, 1940 FCR 110, *Udit Narain Singh v. Board of Revenue*, AIR 1963 SC 786 at p. 788, 1963 Supp (1) SCR 676, *South Central Rly v. A V R Siddhanti* (1974) 4 SCC 335 at pp 341-42, AIR 1974 SC 1755 at p 1750, 1974 Lab IC 587, *Ranjeet Mal v N Railway*, (1977) 1 SCC 484 at p 486, AIR 1977 SC 1701 at pp 1702-03, *B Prabhakar Rao v State of A P*, 1985 Supp SCC 432, 1985 Lab IC 1545, *LIC v Gangadhar*, (1989) 4 SCC 297 at p 305, AIR 1990 SC 185 at p 191, *Ramesh Hirachand v Municipal Corpn of Greater Bombay* (1992) 2 SCC 524 at p 528, *U P Areas Evam Vikas Parishad v Gyan Devi*, (1995) 2 SCC 326, AIR 1995 SC 724, *Prabodh Verma v State of U P* (1984) 4 SCC 251 at p 273, AIR 1985 SC 367, *Ishwar Singh v Kuldip Singh*, 1995 Supp (1) SCC 179 (1995) 29 ATC 144, *J Jose Dhanapaul v S Thomas*, (1996) 3 SCC 587 at p 588, *Arun Tewari v Zila Mansab Snikshak Sangh* (1998) 2 SCC 332 at p 337, AIR 1998 SC 331, *Kasturi v Iyyamperumal*, (2005) 6 SCC 733, AIR 2005 SC 2813.

His presence, however, enables the court to adjudicate more "effectually and completely".<sup>17</sup>

Two tests have been laid down for determining the question whether a particular party is a necessary party to a proceeding.<sup>18</sup>

- (i) There must be a right to some relief against such party in respect of the matter involved in the proceeding in question; and
- (ii) It should not be possible to pass an effective decree in absence of such a party.

Thus, in a suit for partition, all sharers are necessary parties. Similarly, a purchaser of property in a public-auction is a necessary party to the suit for a declaration to set aside the said public-auction. Likewise, in an action against selection and appointment by an authority, candidates who are selected and appointed are directly affected and, therefore, they are necessary parties.

On the other hand, a subtenant is only a proper party in a suit for possession by the landlord against his tenant. So also, grandsons are proper parties to a suit for partition by sons against their father. Likewise, a local authority for whose benefit land is sought to be acquired by the Government is a proper party in land acquisition proceedings. Again, in a complaint against a seniority list prepared by an employer, if no relief is sought against a particular individual, the persons shown as senior to the petitioner/plaintiff are proper parties. But if relief is claimed against a specific person, he is also a necessary party to the proceeding.

It may, however, be noted that where several persons are interested in a suit, it is not always necessary that all of them should be joined as plaintiffs or defendants. Rule 8 of Order 1 applies to such suits and it is sufficient if some of them are joined as plaintiffs or defendants, as the case may be.<sup>19</sup>

### (e) Non-joinder or misjoinder of parties: Rule 9

Where a person, who is a necessary or proper party to a suit has not been joined as a party to the suit, it is a case of non-joinder. Conversely, if two or more persons are joined as plaintiffs or defendants in one suit in contravention of Order 1 Rules 1 and 3 respectively and they are neither necessary nor proper parties, it is a case of misjoinder of parties.

17. *Shahasaheb Mard v. Sadashiv Supdu*, ILR (1918) 43 Bom 575 at p. 581; *Udit Narain v. Board of Revenue*, AIR 1963 SC 786; *Ramesh Hirachand v. Municipal Corpn. of Greater Bombay*, (1992) 2 SCC 524 at p. 529 (SCC).

18. *Kasturi v. Iyyamperumal*, (2005) 6 SCC 733 at p. 738. AIR 2005 SC 2813; *Benares Bank Ltd v. Bhagwan Das*, AIR 1947 All 18; ILR 1946 All 891 (FB); *Bharawan Estate v. Rama Krishna*, AIR 1953 SC 521. 1954 SCR 506; *Hardeva v. Ismail*, AIR 1970 Raj 167; ILR 1970 Raj 20; 1970 Raj LW 316 (FB).

19. For detailed discussion, see *infra*, "Representative suit".

The general rule is that a suit cannot be dismissed only on the ground of non-joinder or misjoinder of parties.<sup>20</sup> Nor a decree passed by a competent court on merits will be set aside on the ground of mis-description of the defendant.<sup>21</sup> However, this rule does not apply in case of non-joinder of a necessary party.<sup>22</sup>

If the person who is likely to be affected by the decree is not joined as a party in the suit or appeal, the suit or appeal is liable to be dismissed on that ground alone.<sup>23</sup> But in *B. Prabhakar Rao v. State of A.P.*<sup>24</sup>, where all the affected persons had not been joined as parties to the petition, and some of them only were joined, the Supreme Court took the view that the interests of the persons who were not joined as parties were identical with those persons who were before the court and were sufficiently and well represented and, therefore, the petition was not liable to be dismissed on that ground. Similarly, no decree or order under Section 47 of the Code can be reversed or substantially varied in appeal, *inter alia*, on account of any misjoinder or non-joinder of parties, not affecting the merits of the case or the jurisdiction of the court, provided that such party is not a necessary party.<sup>25</sup>

#### (f) Objections as to non-joinder or misjoinder of parties: Rule 13

All objections on the ground of non-joinder or misjoinder of parties must be taken at the earliest opportunity, otherwise they will be deemed to have been waived.<sup>26</sup> But if the objection as to non-joinder of necessary party has been taken by the defendant at the earliest stage and the plaintiff declines to add the necessary party, he cannot subsequently be allowed in appeal to rectify the error by applying for amendment.<sup>27</sup>

20. R. 9. See also *Jagan Nath v. Jaswant Singh*, AIR 1954 SC 210 at p. 213, 1954 SCR 892, *GM South Central Rly. v. Siddhanthi case*, (1974) 4 SCC 335, *Laxmishankar v. Yashram Vasta*, (1993) 3 SCC 49 AIR 1993 SC 1587 *S K Saldi v. U P State Sugar Corpn. Ltd.*, (1997) 9 SCC 661 AIR 1997 SC 2182.

21. *Palasibai v. Ratanlal*, (1990) 2 SCC 42.

22. Proviso to R. 9, see also *Diwakar Shrivastava v. State of M P*, 1984 Supp SCC 214 AIR 1984 SC 468, *Jagan Nath v. Jaswant Singh*, AIR 1954 SC 210 1954 SCR 892, *Kanakarathanammal v. V S Loganatha Mudaliar*, AIR 1965 SC 271 (1964) 6 SCR 1.

23. *Naba Kumar v. Radhashyam*, AIR 1931 PC 229 at p. 231 134 IC 654, *Kanakarathanammal v. V S Loganatha Mudaliar*, AIR 1965 SC 271 (1964) 6 SCR 1, *Chief Conservator of Forests v. Collector* (2003) 3 SCC 472 AIR 2003 SC 1805.

24. 1985 Supp SCC 432 1985 Lab IC 1545 see also *Diwakar Shrivastava v. State of M P*, *supra*, *Joseph v. Union of India*, 1993 Supp (2) SCC 627 (1993) 24 ATC 812.

25. Ss. 99, 99-A, see also *Laxmishankar v. Yashram Vasta*, (1993) 3 SCC 49 AIR 1993 SC 1587.

26. R. 13.

27. *Naba Kumar v. Radhashyam*, AIR 1931 PC 229 at p. 231 134 IC 654, *Kanakarathanammal v. V S Loganatha Mudaliar*, AIR 1965 SC 271 (1964) 6 SCR 1, *State Bank of Patiala v. Hypline Carbons Ltd.*, AIR 1990 HP 10.

**(g) Striking out, adding or substituting parties: Rule 10**

Rule 10(1) of Order 1 deals with striking out, addition and substitution of parties.

**(i) Adding or substituting plaintiffs**

If after the filing of the suit, the plaintiff discovers that he cannot get the relief he seeks without joining some other person also as a plaintiff or where it is found that some other person and not the original plaintiff is entitled to the relief, as prayed for, an application for addition or substitution of the plaintiff can be made.

The object underlying this provision is to save honest plaintiffs, believing *bona fide* in the maintainability of their claims being non-suited on a mere technical ground.<sup>28</sup> In other words, the policy is to decide the real questions in controversy between the parties bypassing the mere technical objection for defeating a just and honest claim by discouraging puerile contest on technicalities.<sup>29</sup> The provision, therefore, must be liberally construed so as to advance the cause of justice.<sup>30</sup>

To bring a case within this sub-rule, the following three conditions must be satisfied:<sup>31</sup>

- (i) The suit has been filed in the name of a wrong person as plaintiff;
- (ii) Such mistake must be *bona fide*; and
- (iii) The substitution or addition of the plaintiff is necessary for the determination of the real matter in dispute.

*Illustrations*

1. C, the agent of A, under a *bona fide* mistake files a suit against B in his own name. The court can substitute the name of principal A for that of the original plaintiff C.

2. A joint Hindu family firm files a suit under a *bona fide* mistake in the name of the firm although the provisions of Order 30 relating to filing of suits by firms do not apply to such a firm. The court may allow substitution of the names of the members of the Hindu joint family firm as plaintiffs.

- 28. *Rameswara Das v. Vuppuluri Purnachandra*, AIR 1958 AP 494 at p. 497; *A.M. Koman Nair v. Kunhambu Moolacheri Nair*, AIR 1935 Mad 95 at p. 96; 154 IC 747; *Bal Niketan Nursery School v. Kesari Prasad*, (1987) 3 SCC 587; AIR 1987 SC 1970; *Anil Kumar v. Shrivnath*, (1995) 3 SCC 147.
- 29. *Monghibai v. Cooverji Umersey*, (1938-39) 66 IA 210; AIR 1939 PC 170; *Radhaballabh Prasad v. Raghunath Lal*, AIR 1939 Pat 397 at p. 398; 180 IC 833.
- 30. *Bongi Narayana v. Bangari Gurramma*, AIR 1941 Mad 364; (1940) 2 MLJ 918; *Rameswara Das v. Vuppuluri Purnachandra*, *supra*, *T.N. Housing Board v. T.N. Ganapathy*, (1990) 1 SCC 608; AIR 1990 SC 642; *Razia Begum v. Sahebzadi Anwar Begum*, AIR 1958 AP 195; 1958 ALT 844; (1958) 1 An WR 1, *Savitri Devi v. District judge*, (1999) 2 SCC 577; AIR 1999 SC 976.
- 31. R. 10(1); see also *Razia Begum v. Sahebzadi Anwar Begum*, AIR 1958 AP 195.

3. A, claiming a title under a gift deed, files a suit for possession of a house against B under a *bona fide* mistake that the house was gifted to him by the said deed. When it was found that the deed did not pertain to that house, the real owner could be substituted as plaintiff in place of A.

4. A sues B for possession of a house. B contends that since A has transferred the house to C, he has no title to sue and the suit is, therefore, not maintainable. A maintains his right contending that no transfer was made, but the contention is found to be false. Thereupon, A applies for adding C as a co-plaintiff. The application requires to be rejected since the mistake was not found to be *bona fide*.

Such amendment may be allowed by the court at any stage of the suit or even at the appellate stage and upon such terms and conditions as it thinks just.<sup>32</sup> No person can be added as a plaintiff without his consent.<sup>33</sup>

### (ii) Striking out or adding parties

Sub-rule (2) of Rule 10 empowers the court to add any person as a party to the suit on either of the two grounds:

- (i) Such person ought to have been joined as a plaintiff or a defendant, and is not so joined; or
- (ii) Without his presence, the question involved in the suit cannot be completely decided.<sup>34</sup>

The purpose of this provision is to bring before the court, at the same time, all the persons interested in the dispute so that the dispute may be finally determined at the same time in the presence of all the parties without the delay, inconvenience and expense of several actions and trials and inconclusive adjudications.<sup>35</sup> This provision, thus, confers wide discretion on the court to meet with every case of defect of parties and is not affected by the inaction of the plaintiff to bring the necessary parties on record. Addition of parties is, however, a judicial discretion which is required to be exercised judiciously.<sup>36</sup>

32. *Razia Begum v. Sahebzadi Anwar Begum*, AIR 1958 AP 195 1958 ALT 844 (1958) 1 An WR 1; see also *Kanakarathanammal v V S Loganatha Mudaliar*, AIR 1965 SC 271 (1964) 6 SCR 1, *Ramesh Hirachand v Municipal Corpn. of Greater Bombay*, (1992) 2 SCC 524 at p. 528.

33. R 10(3).

34. R 10(2), see also *Razia Begum v Sahebzadi Anwar Begum*, AIR 1958 AP 195 *Saila Bala Dassi v Nirmala Sundari Dassi*, AIR 1958 SC 394 at p. 398 1958 SCR 1287 *R S Maddanappa v. Chandramma*, AIR 1965 SC 1812 (1965) 3 SCR 283, *Anil Kumar v Shivnath*, (1995) 3 SCC 147.

35. *Anil Kumar v. Shivnath*, (1995) 3 SCC 147, *Razia Begum v Sahebzadi Anwar Begum*, AIR 1958 AP 195 1958 ALT 844 (1958) 1 An WR 1, *Jayashree Chemicals Ltd v K Venkataratnam*, AIR 1975 Ori 86 at p. 87.

36. *Ramesh Hirachand v Municipal Corpn. of Greater Bombay*, (1992) 2 SCC 524.

### (iii) Power and duty of court

The provisions of Rule 10(2) of Order 1 confer very wide powers on the court regarding joining of parties. Such powers have to be exercised on sound judicial principles keeping in mind all the facts and circumstances of the case.

Two considerations especially will have to be kept in mind before exercising powers, namely, (i) the plaintiff is a *dominus litis*. He is the best judge of his interest. It is, therefore, for him to choose his opponent from whom he claims relief and, *normally*, the court should not compel him to fight against a person whom he does not want to fight and from whom he claims no relief; and (ii) if the court is satisfied that the presence of a particular person is necessary to effectively and completely adjudicate all the disputes between the parties, irrespective of the wishes of the plaintiff, the court may exercise the power and join a person as party to the suit.<sup>37</sup>

The power may be exercised by the court at any stage of the proceedings either upon an application of the parties or even *suo motu* (of its own motion) and on such terms and conditions as may appear to the court to be just.

In *Anil Kumar v. Shivanath*<sup>38</sup>, considering the provisions of Order 1 Rule 10(2), the Supreme Court observed, "Though the court may have power to strike out the name of a party improperly joined or add a party either on application or without application of either party, but the condition precedent is that the court must be satisfied that the presence of such party to be added, would be necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit ... . *The object of the rule is to bring on record all the persons who are parties to the dispute relating to the subject-matter so that the dispute may be determined in their presence at the same time without any protraction, inconvenience and to avoid multiplicity of proceedings*".<sup>39</sup>

(emphasis supplied)

Thus, if a special statute makes a person a necessary party to the proceeding and also provides that non-joinder thereof will result in dismissal of the petition, the court cannot use the curative powers of Order 1 Rule 10 as to avoid consequences of non-joinder of such party.<sup>40</sup>

37. *Razia Begum v. Sahebzadi Anwar Begum*, AIR 1958 AP 195; *Ramesh Hirachand v. Municipal Corpn. of Greater Bombay*, (1992) 2 SCC 524, *Savitri Devi v. District Judge*, (1999) 2 SCC 577; AIR 1999 SC 976.

38. (1995) 3 SCC 147.

39. *Ibid*, at pp. 149-50; see also *Kasturi v. Iyyamperumal*, (2005) 6 SCC 733; AIR 2005 SC 2813.

40. *Mohan Raj v. Surendra Kumar*, AIR 1969 SC 677 at p. 681; (1969) 1 SCR 630.

(iv) Test

The test is not whether the plaintiff agrees or objects to the addition of the party to the suit, but whether presence of such party is required for full and complete adjudication of the dispute.

(v) Principles

Suffice it to say that in the leading case of *Razia Begum v. Sahebzadi Anwar Begum*<sup>41</sup>, the Supreme Court has laid down the following principles regarding the power of the court to add the parties under Rule 10(2) of the Code:

- (1) That the question of addition of parties under Rule 10 of Order 1 of the Code of Civil Procedure, is generally not one of initial jurisdiction of the court, but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case; but in some cases, it may raise controversies as to the power of the court, in contradistinction to its inherent jurisdiction, or, in other words, of jurisdiction in the limited sense in which it is used in Section 115 of the Code;
- (2) That in a suit relating to property, in order that a person may be added as a party, he should have a direct interest as distinguished from a commercial interest in the subject-matter of the litigation;
- (3) Where the subject-matter of a litigation is a declaration as regards status or a legal character, the rule of present or direct interest may be relaxed in a suitable case where the court is of the opinion that by adding that party, it would be in a better position effectually and completely to adjudicate upon the controversy; (and)
- (4) The cases contemplated in the last proposition have to be determined in accordance with the statutory provisions of Sections 42 and 43 of the Specific Relief Act.<sup>42</sup>

In *Razia Begum v. Anwar Begum*<sup>43</sup>, A sought a declaration that she was the legally-wedded wife of B. One C claimed to be another married wife of B and sought to be added as a party defendant. The prayer was granted since the declaration sought for concerned the status of marriage and legitimacy of children and would affect the parties for generations to come. Thus, the test is not whether the plaintiff agrees to

41 AIR 1958 AP 195 1958 ALT 844 (1958) 1 An WR 1, see also *Firm of Mahadeva Rice and Oil Mills v. Chennimalai Goundar*, AIR 1968 Mad 287 at p. 289.

42 Act 1 of 1877, Ss. 34 and 35 of the Specific Relief Act, 1963.

43 AIR 1958 AP 195 1958 ALT 844 (1958) 1 An WR 1, see also *Razia Begum v. Sahebzadi Anwar Begum*, AIR 1958 SC 886 1959 SCR 1111.

adding a party as a defendant or not, but whether the relief claimed by the plaintiff will directly affect the intervener in the enjoyment of his rights.<sup>44</sup> The court must, in every case, record reasons in support of its order impleading or refusing to implead a party.<sup>45</sup>

But the party cannot be added so as to introduce a new cause of action, or to alter the nature of the suit. The power can be exercised by the court at the stage of trial and that too without prejudice to the said party's plea of limitation.<sup>46</sup> Rule 10-A enables the court in its discretion to request any pleader to address as to any interest likely to be affected by its decision, if such party is not represented by a pleader.

A reference may be made to a decision of the Supreme Court in *Ramesh Hirachand v. Municipal Corpn. of Greater Bombay*<sup>47</sup>. In that case, the plaintiff was a dealer on the land held by the Hindustan Petroleum Corporation (lessee) and was in possession of a service station. The Municipal Corporation issued a notice to the plaintiff for demolition of a certain construction alleging that it was unauthorised. The plaintiff filed a suit for permanent injunction against the Municipal Corporation. Hindustan Petroleum Corporation applied for being impleaded as a party defendant on the ground that it had material to show that the structure was unauthorised. The prayer was granted by the courts below. The plaintiff approached the Supreme Court.

Allowing the appeal and setting aside the order, the Supreme Court held that the Hindustan Petroleum Corporation was neither necessary nor proper party to the proceedings. The person to be joined must be one whose presence is necessary as a party. The test is not whether his presence is necessary for the correct solution of the dispute before the court but whether the order would affect him or his interest would be prejudiced. In the instant case, the question before the court was whether an unauthorised structure was made by the plaintiff contrary to the Bombay Provincial Municipal Corporation Act and not whether such construction was contrary to the agreement between the plaintiff and Hindustan Petroleum Corporation. It was altogether a different cause of action. "The mere fact that a fresh litigation can be avoided is no ground to invoke the power under the rule in such cases."<sup>48</sup>

The Court rightly stated, "It cannot be said that the main object of the rule is to prevent multiplicity of actions though it may incidentally have that effect ... It is, therefore, necessary that the person must be

44. *Sampatbai v. Madhusingh*, AIR 1960 MP 84, *Dollfus Mieg Et Compagnie SA v. Bank of England*, (1950) 2 All ER 605

45. *Neelacanta Panicker v. Govinda Pillai*, 1968 KLT 691.

46. R. 10(5); *Ramprasad v. Vijaykumar*, AIR 1967 SC 278; 1966 Supp SCR 188; *K. Venkateswara Rao v. Bekkam Narasimha*, AIR 1969 SC 872; (1969) 1 SCR 679.

47. (1992) 2 SCC 524 at p. 528.

48. *Ramesh Hirachand v. Municipal Corpn. of Greater Bombay*, (1992) 2 SCC 524 at p. 528; *Kasturi v. Iyyamperumal*, (2005) 6 SCC 733; AIR 2005 SC 2813.

directly or legally interested in the action in the answer, i.e., he can say that the litigation may lead to a result which will affect him legally, that is, by curtailing his legal rights. *It is difficult to say that the rule contemplates joining as a defendant a person whose only object is to prosecute his own cause of action.*"<sup>49</sup> (emphasis supplied)

The court is also authorised to strike out any party improperly joined either as a plaintiff or as a defendant in a suit.<sup>50</sup>

#### (vi) Effect

Where any person is added as defendant in the suit, as regards him, the suit shall be deemed to have been instituted from the date he is joined as a party.<sup>51</sup>

Where a defendant is added, the plaint shall be amended and the amended copies of the summons and the plaint must be served on the new defendant.<sup>52</sup>

#### (h) Transposition of parties

In transposition, a person who is already on record as a plaintiff or a defendant seeks his transposition from one capacity to another capacity; i.e. from plaintiff to defendant or *vice versa*.

Since primary object of Order 1 Rule 10 of the Code is to avoid multiplicity of proceedings, there is no reason why the doctrine of addition or striking out parties does not apply to transferring the parties from one side to the other side.<sup>53</sup>

A court can, therefore, order transposition of parties in an appropriate case. This can be done either on an application by a party or by a court *suo motu*.<sup>54</sup> No such transposition, however, can be allowed if it alters the character of the suit or causes prejudice to the opposite party.<sup>55</sup>

#### (i) General principles

From the relevant provision of the Code and various decisions of the Apex Court, the following principles regarding parties to suit emerge:

49. *Ibid*, at p. 531 (SCC), see also *New Redbank Tea Co. (P) Ltd v. Kumkum Mittal*, (1994) 1 SCC 402.

50. R 10(2), see also *Kasturi v. Iyyamperumal* (2005) 6 SCC 733 AIR 2005 SC 2813

51. R 10(5) 52. R 10(4)

53. *Saila Bala Dassi v. Nirmala Sundari Dassi*, AIR 1958 SC 394 1958 SCR 1287; *Bhupendra Narayan v. Rajeshwar Prosad*, (1930-31) 58 IA 228 AIR 1931 PC 162 132 IC 610

54. *Ibid*, see also *Dalbir Singh v. Lakhi Ram*, AIR 1979 P&H 10; *Mohanlal v. Bhikhabhai*, (1978) 19 Guj LR 865; *Bhairabendra Narain v. Udai Narain*, AIR 1924 Cal 251

55. *Ibid*, see also *Santuram Hari v. Trust of India Assurance Co.*, AIR 1945 Bom 11 (1944) 46 Bom LR 752; *Khazir Bhat v. Ahmad Dar*, AIR 1960 J&K 57

1. A question of joinder of parties is a matter of procedure and not of substantive right.
2. The Code of Civil Procedure confers very wide and extensive discretionary powers on a court in the matter of joinder of parties.
3. The primary object of joinder of parties is to ensure that all suits are decided finally and conclusively on merits in the presence of all parties.
4. The provisions relating to joinder of parties, therefore, should be construed liberally.
5. A plaintiff is a *dominus litis* and has a right to choose his adversary against whom he wants to fight and from whom he seeks relief. It is not province of a court of law to interfere with that right.
6. But it is also the duty of the court to do justice. And to achieve that end, the court may add, delete, substitute or transpose any party notwithstanding objection of the plaintiff.
7. No person can be joined as plaintiff without his consent.
8. An order of addition, deletion, substitution or transposition of a party can be made at any stage of the suit irrespective of the law of limitation.
9. Such an order can be passed on such terms as the court deems fit.
10. An order of addition, deletion, substitution or transposition can be made either on an application by a party or by a court *suo motu*.
11. Where a defendant is added, the plaint should be amended.
12. Where a defendant is added, the proceedings against him shall be deemed to have commenced from the date of service of summons upon him.
13. Objection as to misjoinder or non-joinder of parties should be taken at the earliest possible opportunity.
14. A court may not add, delete, substitute or transpose a party, if it changes the nature or character of the suit, or alters cause of action, or results in *de novo* trial; or seeks to defeat a valuable right acquired by any person by passage of time or otherwise.
15. If misjoinder of plaintiffs or defendants embarrass or delay the trial of the suit, the court may order separate trials.
16. A court dealing with an application for adding, deleting, substituting or transposing a party must have jurisdiction to try the suit.
17. *Normally*, a court should not be joined as a party to the suit.
18. *Ordinarily*, a superior court will not interfere with an order passed by the trial court granting or rejecting an application for joining of parties.

19. A suit cannot be dismissed on the ground of misjoinder or non-joinder of parties.
20. If the necessary party is not joined, a suit can be dismissed on that ground alone.

## 5. REPRESENTATIVE SUIT: RULE 8<sup>56</sup>

### (a) General

As a general rule, all persons interested in a suit ought to be joined as parties to it, so that the matters involved therein may be finally adjudicated upon and fresh litigations over the same matters may be avoided. Rule 8 is an exception to this general principle. It provides that when there are a number of persons similarly interested in a suit, one or more of them can, with the permission of the court or upon a direction from the court, sue or be sued on behalf of themselves and others.<sup>57</sup> The

56. Rule 8 reads thus:

*"8. One person may sue or defend on behalf of all in same interest. — (1) Where there are numerous persons having the same interest in one suit;*

- (a) one or more of such persons may, with the permission of the court, sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested;
- (b) the court may direct that one or more of such persons may sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested.

(2) The court shall, in every case where a permission is given under sub-rule (1), at the plaintiff's expense, give notice of the institution of the suit to all persons so interested, either by personal service, or, where, by reason of the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

(3) Any person on whose behalf, or for whose benefit, a suit is instituted, or defended under sub-rule (1), may apply to the court to be made a party to such suit.

(4) No part of the claim in any such suit shall be abandoned under sub-rule (1), and no such suit shall be withdrawn under sub-rule (3) of R. 1 of Or. 23 and no agreement, compromise or satisfaction shall be recorded in any such suit under R. 3 of that Order, unless the court has given, at the plaintiff's expense, notice to all persons so interested in the manner specified in sub-rule (2)

(5) Where any person suing or defending in any such suit does not proceed with due diligence in the suit or defence, the court may substitute in his place any other person having the same interest in the suit

(6) A decree passed in a suit under this rule shall be binding on all persons on whose behalf, or for whose benefit, the suit is instituted, or defended, as the case may be

*Explanation —* For the purpose of determining whether the persons who sue or are sued, or defend, have the same interest in one suit it is not necessary to establish that such persons have the same cause of action as the persons on whose behalf, or for whose benefit, they sue or are sued, or defend the suit, as the case may be "

57. *Dwankar Shrivastava v State of M P*, 1984 Supp SCC 214 AIR 1984 SC 468

plaintiff in a representative suit need not obtain the previous consent of the persons whom he seeks to represent.

### (b) Definition

Thus, "representative suit" may be defined as under:

"A 'representative suit' is a suit filed by or against one or more persons on behalf of themselves and others having the same interest in the suit."

### (c) Object

The object underlying this provision is really to facilitate the decision of questions in which a large number of persons are interested without recourse to the ordinary procedure.<sup>58</sup>

Order 1 Rule 8 of the Code has been framed in order to save time and expense, to ensure a single comprehensive trial of question in which numerous persons are interested and to avoid harassment to parties by a multiplicity of suits.<sup>59</sup> In cases where the common right or interest of a community or members of an association or large sections is involved, there will be insuperable practical difficulties in the institution of suits under the ordinary procedure, where each individual has to maintain an action by a separate suit. To avoid numerous suits being filed for decision of a common question, Order 1 Rule 8 has come to be enacted.<sup>60</sup> The provision, therefore, should receive liberal interpretation which will subserve the object of its enactment.<sup>61</sup>

To bring a case within the provisions of Order 1 Rule 8 of the Code all the members of a class should have a common interest in a subject-matter and a common grievance and the relief sought should, in its nature, be beneficial to all.<sup>62</sup>

Order 1 Rule 8 of the Code is an enabling provision and does not compel anyone to represent many if, by himself, he has a right of suit. The rule does not vest a right of suit in a person and if he, by himself, has no right to sue, he cannot proceed to sue on behalf of others by

58. *Kodia Goundar v. Velandi Goundar*, AIR 1955 Mad 281 at p. 287; ILR 1955 Mad 339 (FB); *T.N. Housing Board v. T.N. Ganapathy*, (1990) 1 SCC 608 at pp. 611-12. AIR 1990 SC 642.

59. *Lingam Ramaseshayya v. Myneni Ramayya*, AIR 1957 AP 964. 1956 An WR 249; *Srinivasa Chariar v. Raghava Chariar*, ILR (1900) 23 Mad 28.

60. *Kodia Goundar v. Velandi Goundar*, AIR 1955 Mad 281 at p. 287; ILR 1955 Mad 339 (FB); *T.N. Housing Board v. T.N. Ganapathy*, (1990) 1 SCC 608 at pp. 611-12. AIR 1990 SC 642.

61. *T.N. Housing Board v. T.N. Ganapathy*, (1990) 1 SCC 608; *Teja Singh v. UT, Chandigarh*, AIR 1982 P&H 169; (1982) 1 P&H 383. (1982) 84 PLR 150 (FB).

62. *Ibid.*, see also *Lingam Ramaseshayya v. Myneni Ramayya*, AIR 1957 AP 964. 1956 An WR 249.

invoking the aid of Order 1 Rule 8 of Code. At the same time, Order 1 Rule 8 of the Code does not debar a member of the village community from maintaining a suit in his own right in respect of a wrong done to him though the act complained of may also be injurious to some other villagers.<sup>63</sup>

#### (d) Enabling provision

Order 1 Rule 8 of the Code is merely an enabling provision. It, however, does not compel an individual to represent body of persons having the same interest if his action is otherwise maintainable without joining the rest in the suit. In other words, it does not debar a member of a community from maintaining a suit in his own right in respect of a wrong done to him.<sup>64</sup> It is also not exhaustive in nature.<sup>65</sup>

#### (e) Conditions

For the rule to apply, the following conditions must exist:<sup>66</sup>

- (i) The parties must be numerous;
- (ii) They must have the same interest in the suit;
- (iii) The permission must have been granted or direction must have been given by the court; and
- (iv) Notice must have been issued to the parties whom it is proposed to represent in the suit.

The scheme of filing a representative suit thus indicates a four dimensional movement:

- (1) action by one party called plaintiff against opposing party called defendant;
- (2) a matter said to be in dispute;
- (3) cause of action; and
- (4) legal relief.<sup>67</sup>

63. *T.N. Housing Board v. T.N. Ganapathy*, (1990) 1 SCC 608; *Teja Singh v. UT, Chandigarh*, AIR 1982 P&H 169 (1982) 1 P&H 383 (1982) 84 PLR 150 (FB), *Lingam Ramaseshaya v. Myneni Ramayya*, AIR 1957 AP 964 1956 An WR 249, see also *Durga Dass v. Lt. Col. Banaras Dev*, AIR 1972 J&K 6, *Saraswati Bai v. Durga Sahai*, AIR 1982 MP 147.

64. *Lingam Ramaseshaya v. Myneni Ramayya*, AIR 1957 AP 964 1956 An WR 249. *S.K. Murugesu v. Baruda Arunagiri*, AIR 1951 Mad 498 (1950) 2 MLJ 770. *T.N. Housing Board v. T.N. Ganapathy*, (1990) 1 SCC 608 AIR 1990 SC 642.

65. *Ibid*, see also *Lala Maha Deo v. Ranbir Singh*, AIR 1944 Lah 220 (FB).

66. *T.N. Housing Board v. T.N. Ganapathy* (1990) 1 SCC 608. *Kalyan Singh v. Chhoti*, (1990) 1 SCC 266 AIR 1990 SC 397. *Kodia Goundar v. Velandi Goundar* AIR 1955 Mad 281.

67. *Municipal Council, Amravati v. Gound Vishnu Sarnaik*, AIR 1976 Bom 401 1976 Mah LJ 470.

(i) Numerous persons

The first requirement for the application of Rule 8 is that numerous persons must be interested in the suit. The word "numerous" is by no means a term of art. It does not fix any limit to the number. It is not synonymous with the word "numberless" or "innumerable". It has an ordinary meaning implying a group of persons. Therefore, the question whether the parties can be said to be "numerous" must be decided by the court upon the facts of each case taking into account the nature of controversy, the subject-matter in dispute and so on.

It is, however, not necessary that the number of persons should be capable of ascertainment. But it is necessary that the body of persons represented by the plaintiffs or defendants must be sufficiently definite so as to enable the court to recognize as participants in the suit. Thus, a representative suit on behalf of inhabitants of a village with reference to village property, or on behalf of the members of a sect, caste or community is maintainable under this rule.<sup>68</sup>

(ii) Same interest

The second requirement for the maintainability of the representative suit is that the persons on whose behalf the suit is instituted must have the same interest. The interest must be common to them all or they must have a common grievance which they seek to get redressed. Community of interest is, therefore, essential and it is a condition precedent for bringing a representative suit.<sup>69</sup>

The interest need not be a proprietary one, nor need it be joint or concurrent. As explained by Lord MacNaughten in *Duke of Bedford v. Ellis*<sup>70</sup>, "given a common interest and common grievance a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent". Thus, where a person dies leaving numerous creditors, any one of them may sue on behalf of himself and other creditors, or any one taxpayer may file a suit against a municipality on behalf of himself and the other taxpayers to restrain the municipality from misapplying its funds.

The Explanation added by the Amendment Act of 1976 clarifies that such persons need not have the same cause of action. Again, it is not necessary that the interest must arise from the "same transaction". Even if the persons who are represented in a representative suit have separate causes of action or there are separate transactions, a suit

68. *Hasanali v. Mansoorali*, (1947-48) 75 IA 1: AIR 1948 PC 66; *Moran Mar Basselios Catholicos v. Thukalan Paulo Avira*, AIR 1959 SC 31.

69. *Kodia Goundar v. Velandi Goundar*, AIR 1955 Mad 281, at pp. 286-87; see also *TN Housing Board v. T.N. Ganapathy*, (1990) 1 SCC 608.

70. 1901 AC 1 (HL).

under Order 1 Rule 8 can be filed if all of them have the same interest.<sup>71</sup> Explanation to Rule 8 of Order 1, as inserted by the Code of Civil Procedure (Amendment) Act, 1976 makes it clear that the persons need not have the same cause of action.

In Statement of Objects and Reasons, it was stated:

"Rule 8 of Order 1 deals with representative suits. Under this rule, where there are numerous persons having the same interest in one suit, one or more of them may, with the permission of the court, sue or be sued, on behalf of all of them. The rule has created a doubt as to whether the party representing others should have the same cause of action as the persons represented by him. The rule is being substituted by a new rule and an Explanation is being added to clarify that such persons need not have the same cause of action."<sup>72</sup>

In *T.N. Housing Board v. T.N. Ganapathy*<sup>73</sup>, residential buildings were allotted by the Housing Board to the applicants who belonged to the low-income group. After settlement of price, excess demand was made by the Board. The allottees challenged the demand by filing a suit in a representative capacity. It was contended that such a suit in a representative capacity was not maintainable as separate demand notices were issued against each of the allottees, giving rise to separate causes of action. Negating the contention the Supreme Court held that all of them had the same interest and, therefore, the suit was maintainable.

### (iii) Permission by court

The third requirement for the application of the rule is that the permission must have been granted or the direction must have been given by the court. If this essential condition is not fulfilled, the suit does not become a representative one. The court has discretion to grant permission to a person to sue in a representative capacity. It cannot, however, *ipso facto* grant such permission merely on the basis of averments made in the plaint. In deciding whether such leave is to be granted, the principal consideration that should weigh with the court is whether it is satisfied that there is sufficient community of interest as between the plaintiffs or the defendants, as the case may be, to justify the adoption of the procedure laid down in Rule 8.<sup>74</sup>

The proper course is to obtain permission before the suit is filed. But it may be granted after filing of the suit or even at an appellate stage by allowing amendment of the plaint. Where a plaintiff intends to sue on behalf of others, it is the plaintiff who should apply for leave

71 *TN Housing Board v TN Ganapathy*, (1990) 1 SCC 608

72 Statement of Objects and Reasons, cl. 55(iv)

73 (1990) 1 SCC 608 AIR 1990 SC 642

74 *Kodla Goundar v Velandi Goundar* AIR 1955 Mad 281, *Kalyan Singh v Chhoti*, (1990) 1 SCC 266 at p. 271 AIR 1990 SC 397 at p. 401

Where numerous defendants having the same interest are sued and it is sought to be defended by one of them on behalf of others, such application should be made by that defendant. No particular form has been prescribed by the Code for grant of permission. Such permission may be express or implied and may be gathered from the proceedings of the court in which the suit is filed. Thus, where the court orders publication of notice in a newspaper, the court must be deemed to have granted the permission. Under sub-rule (1)(b), where there are numerous persons having the same interest in the suit, the court may direct that one or more of such persons may sue or be sued or may defend such suit on behalf of, or for the benefit of, all persons so interested. Once the permission is granted, it enures in appeal also.

#### (iv) Notice

As stated above, where a person sues or is sued, or defends a suit on behalf of himself and others, any decree that may be passed in the suit is binding upon them all<sup>75</sup>, unless such decree has been obtained by fraud or collusion.<sup>76</sup> It is, therefore absolutely necessary that the notice of the suit should be given to all the parties who would be bound by the decree, for otherwise a person might be prejudicially affected by such decree even though he was not on record and not aware of the suit. The issue of notice of the institution of the suit is, thus, peremptory, and if it is not given, the decree will bind only those parties who are on record.<sup>77</sup>

It is the duty of the court to take care that proper notice is issued which would provide sufficient information to the persons interested in the suit so that they might apply for becoming parties to the suit. It is also the duty of the court to see that the notice is published in a newspaper which the persons interested are likely to read. This is particularly necessary in view of the fact that the decision in a representative suit becomes *res judicata* not only against the persons who are on record but also against them who are not on record and yet covered under this rule.<sup>78</sup>

#### (f) Title

Where the suit is filed by or against persons in a representative capacity, that fact should be stated in the body of the plaint as well as in the

75. Expln. VI to S. 11. See also, R. 8(6); *Forward Construction Co. v. Prabhat Mandal (Regd.)*, (1986) 1 SCC 100. AIR 1986 SC 391. For detailed discussion, see *supra*, Chap. 2.

76. S. 44, Evidence Act, 1872.

77. *Kumaravelu Chettiar v. Ramaswami Ayyar*, (1932-33) 60 IA 278; AIR 1933 PC 183.

78. *Bishan Singh v. Mastan Singh*, AIR 1960 Punj 26, *Punjab Coop. Bank Ltd. v. Hari Singh*, AIR 1933 Lah 749; *Kumaravelu Chettiar v. Ramaswami Ayyar*, (1932-33) 60 IA 278; AIR 1933 PC 183.

title of the suit. The title of the suit<sup>79</sup> where the plaintiff sues in a representative capacity is as follows:

A, B, on behalf of himself and  
all other creditors of C, D

Plaintiff;

*Versus*

C, D

Defendant.

### (g) Addition or substitution of parties

Sub-rule (3) of Rule 8 provides that any person on whose behalf a suit is filed or defended under sub-rule (1) may apply to the court to be added as a party to the suit. Such person must show that the conduct of the suit is not in proper hands and that his interests will be seriously affected to his prejudice if he is not joined as a party to the suit. The reason is that considerable delay may be caused in filing a fresh suit by such party and the cost of litigation will also be increased. Such application must be made without delay. Such person can only be added as a co-plaintiff or a co-defendant but cannot be substituted for the original parties. But sub-rule (5) as added by the Amendment Act of 1976 now provides that where any person suing in a representative capacity or defending a representative suit does not proceed with due diligence in the suit or defence, the court may substitute in his place any other person having the same interest in the suit.

### (h) Non-compliance: Effect

Rule 8 is mandatory and must be complied with. A suit filed without complying with the provisions of Rule 8 is not maintainable. Likewise, a decree passed in a representative suit without observing the conditions prescribed by Rule 8 will not bind the persons represented in the suit, though it will bind the persons joined as parties.<sup>80</sup>

### (i) Withdrawal or compromise

Under sub-rule (4), no part of the claim in a representative suit can be abandoned under sub-rule (1), and no such suit can be withdrawn under sub-rule (3) of Rule 1 of Order 23 and no agreement, compromise or satisfaction can be recorded in any such suit under Order 23 Rule 3, unless the court has given, at the plaintiff's expense, notice to all

<sup>79</sup> For other details in a plaint see *infra*, Appendix A

<sup>80</sup> *Bhagbat Jena v. Gobardhan Patnaik* AIR 1983 Ori 50 (1982) 50 Cut LT 30; *Hindu Religious & Charitable Endowment v. Nattamai K. S. Eilappa* AIR 1987 Mad 187 (1987) 100 LW 240 (Mad); *Sri Ram Krishna Mission v. Paramanand*, AIR 1977 All 421.

persons so interested in the manner specified in sub-rule (2) either by personal service or by public advertisement. Similarly, Order 23 Rule 3-B as inserted by the Amendment Act of 1976 provides that no agreement or compromise can be entered in a representative suit without the leave of the court.

#### (j) Conduct of suit: Rule 8-A

Rule 8-A empowers the court to permit a person or body of persons interested in any question of law in issue in any suit to present his or its opinion before the court and to take part in the proceedings in the suit. This power is discretionary and hence a person or body of persons even though interested or concerned with a question of law arising in the suit cannot claim to present his or its opinion or to take part in the proceedings of the suit as of right. Under Rule 11, the court may give the conduct of a suit to such person as it deems fit, while Rule 12 provides that the plaintiffs or the defendants may authorise one or more of them to appear, plead or act for them.<sup>81</sup>

#### (k) Decree

A decree passed in a representative suit is binding on all persons on whose behalf, or for whose benefit, such suit is instituted or defended.<sup>82</sup> It also operates as *res judicata*.<sup>83</sup>

#### (l) Res judicata

Explanation VI to Section 11 deals with representative suits. It states that where a representative suit has been decided, such a decision would operate as *res judicata*.<sup>84</sup>

#### (m) Abatement

In a representative suit, the persons appointed to conduct such suit are merely the representatives of other persons who are constructively parties to the suit. Hence, even if any person dies such suit will not abate and other person or persons interested in the suit may proceed with the suit or may apply to be added as plaintiff or plaintiffs.<sup>85</sup>

81. R. 11, see also, R. 10-A.

82. R. 8(6).

83. See *infra*, "Res judicata".

84. For detailed discussion, see *supra*, Chap. 2.

85. *Ram Kumar v. Jiwanlal*, AIR 1960 Mad 288; *State of Rajasthan v. Parwati Devi*, AIR 1966 Raj 210; *Venkatanarayana v. Sabbamal*, (1914-15) 42 IA 125; AIR 1915 PC 124.

### (n) Costs

In a representative suit also, parties on record may be made liable to pay costs. In exceptional cases, however, even unrepresented parties (i.e. parties not on record) may be directed to pay costs, to the other side.<sup>86</sup> In appropriate cases, the court may direct costs to be paid out of the property belonging to the community represented in the suit.<sup>87</sup>

### (o) Execution

A decree passed in a representative suit can be executed like any other decree passed in a regular suit. It can be executed against the persons representing and who are parties *eo nomine* as also against the persons represented through parties on record.<sup>88</sup>

## 6. FRAME OF SUIT: ORDER 2

### (a) Inclusion of whole claim: Rules 1-2

Every suit must include the whole of the plaintiff's claim in respect of the cause of action<sup>89</sup>, and, as far as practicable, all matters in dispute between the parties be disposed of finally.<sup>90</sup> The intention of the legislature underlying the provisions appears to be that as far as possible all matters in dispute between the parties relating to the same cause of action should be disposed of in the same suit so as to prevent further litigation.<sup>91</sup>

### (b) "As far as practicable"

The words "*as far as practicable*" indicate that in each case the court will have to see whether it was practicable for the plaintiff so to frame his suit as to include a cause of action which he had omitted or intentionally relinquished. Thus, this provision is more in the nature of a general policy statement than a mandatory requirement.<sup>92</sup>

86 *Musaddi Lal v. Dal Chand*, AIR 1935 Oudh 369, *Bhicoobai v. Haribai Ragun*, AIR 1917 Bom 141.

87 *Geereeballa Dabee v. Chunder Kant* ILR (1885) 11 Cal 213.

88 For analytical discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. III at pp. 85-90.

89 R 2(1)

90 R 1

91 See "Object", *infra*

92 *Snankartai v. Gangabisen*, AIR 1972 Bom 326 at p. 331-1972 Mah LJ 738.

### (c) Splitting of claim

Order 2 Rule 2<sup>93</sup> lays down that every suit must include the whole of the claim to which the plaintiff is entitled in respect of the cause of action and where the plaintiff omits to sue for or intentionally relinquishes any portion of his claim, he shall not afterwards be allowed to sue in respect of the portion so omitted or relinquished.

### (d) Object

The provision of Order 2 Rule 2 is based on the cardinal principle of law that a defendant should not be vexed twice for the same cause. The principle contained in this provision is designed to counteract two evils, namely, (i) splitting up of claims and (ii) splitting up of remedies.<sup>94</sup>

In *Naba Kumar v. Radhashyam*<sup>95</sup>, the Privy Council stated, "The rule in question is intended to deal with the vice of splitting a cause of action. It provides that a suit must include the whole of any claim which the plaintiff is entitled to make in respect of the cause of action on which he sues, and that if he omits (except with the leave of the court) to sue for any relief to which his cause of action would entitle him, he cannot claim it in a subsequent suit. *The object of this salutary rule is doubtless to prevent multiplicity of suits.*" (emphasis supplied)

The Supreme Court has also stated that Order 2 Rule 2 is based on "cardinal principal that the defendant should not be vexed twice for the same cause."<sup>96</sup>

93. Or. 2 R. 2 reads as under:

- "2. (1) Every suit shall include the whole of the claim which the plaintiff is entitled to in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court.
- (2) Where a plaintiff omits to sue in respect of, or relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.
- (3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any such relief so omitted."

94. *Naba Kumar v. Radhashyam*, AIR 1931 PC 229; 134 IC 654; *Mohd. Khalil Khan v. Mahbub Ali Mian*, (1947-48) 75 IA 121; AIR 1949 PC 78; *Kewal Singh v. Lajwanti*, (1980) 1 SCC 290; AIR 1980 SC 161 at p. 163, *Deva Ram v. Ishwar Chand*, (1995) 6 SCC 733; *Abnashi Singh v. Lajwant Kaur*, AIR 1977 Punj 1 (3); *State of Maharashtra v. National Construction Co.*, (1996) 1 SCC 735; AIR 1996 SC 2367.

95. AIR 1931 PC 229 at p. 230; 134 IC 654.

96. *Deva Ram v. Ishwar Chand*, (1995) 6 SCC 733 at p. 737; AIR 1996 SC 378 at p. 380; *Kunjan Nair v. Narayanan Nair*, (2004) 3 SCC 277; AIR 2004 SC 1761.

(e) Order 2 Rule 2 and *res judicata*<sup>97</sup>

## (f) Interpretation

The provisions of Order 2 Rule 2 are penal in nature and divestive in effect. They should, therefore, be construed strictly. A plea of Order 2 Rule 2 is highly technical and deprives a party to a legitimate right otherwise available to him. Hence, it should not be lightly upheld.<sup>98</sup> Such plea should be raised at the earliest opportunity.<sup>99</sup>

## (g) Illustrations

Let us consider few illustrative cases to understand the principle.

- (1) A lets a house to B at a yearly rent of Rs 1200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for the year 1906. A shall not afterwards sue B for the rent due for 1905 or 1907.
- (2) A advances loan of Rs 2200 to B. To bring the suit within the jurisdiction of court X, A sues B for Rs 2000 only. A cannot afterwards sue for Rs 200.
- (3) A sues B for Rs 200. Against this claim, B claims set-off for Rs 200 being part of Rs 1200 due to B by A but omits to counterclaim the balance of Rs 1000. B cannot afterwards sue A for Rs 1000.
- (4) A sues B for possession alleging that B is tenant in arrears. The suit is dismissed on the ground that B is mortgagee in possession. A subsequent suit by A against B for redemption is not barred.
- (5) A sues B for rent. The suit is dismissed on finding that A was not the landlord but A and B were tenants-in-common. A subsequent suit by A against B for partition of property is not barred.

## (h) Conditions

To make the rule applicable, the following three conditions must be satisfied<sup>100</sup>, namely:

- (i) The second suit must be in respect of the same cause of action as that on which the previous suit was based;
- (ii) In respect of that cause of action, the plaintiff was entitled to more than one relief, and

97. For detailed discussion, see *supra*, "Res judicata and splitting of claims", Chap-2.

98. *Gurbux Singh v. Bhooralal*, AIR 1964 SC 1810 (1964) 7 SCR 831, *Deva Ram v. Ishwar Chand*, (1995) 6 SCC 733

99. *Rikabdas v. Deepak Jewellers*, (1999) 6 SCC 40.

100. *Gurbux Singh v. Bhooralal*, AIR 1964 SC 1810 at p 1812 (1964) 7 SCR 831. See also *Abnashi Singh v. Lajwanti Kaur*, AIR 1977 P&H 1, *Inacio Martins v. Narayan Hari Naik*, (1993) 3 SCC 123; AIR 1993 SC 1756

- (iii) Being thus entitled to more than one relief, the plaintiff without leave of the court omitted to sue for the relief for which the second suit has been filed.

In other words, before the bar of Order 2 Rule 2 is invoked, the following three questions should be asked:

- (1) Whether the cause of action in the previous suit and the subsequent suit is identical?
- (2) Whether the relief claimed in the subsequent suit could have been given in the previous suit on the basis of the pleadings made in the plaint?
- (3) Whether the plaintiff omitted to sue for a particular relief on the cause of action which has been disclosed in the previous suit?<sup>101</sup>

(i) Same cause of action<sup>102</sup>

In order to apply the provisions of Order 2 Rule 2 to bar the second suit, it must be proved that the second suit must have been based on the same cause of action on which the previous suit was based. Unless this condition is fulfilled, there could be no bar to the subsequent suit. Unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based, there would be no scope for the application of the bar of Order 2 Rule 2.<sup>103</sup> The cause of action should not merely be similar, but it must be the same.

As Mulla<sup>104</sup> states, "This rule does not require that when several causes of action arise from one transaction, the plaintiff should sue for all of them in one suit. What the rule lays down is that there is one entire cause of action, the plaintiff cannot split the cause of action into parts so as to bring separate suits in respect of those parts." When the subsequent suit is based on a cause of action different from that in the first suit, the subsequent suit is not barred. The rough test, although not a conclusive one, as to whether the cause of action in a subsequent suit is the same as that in the former suit, is to see whether the same evidence will sustain both the suits.<sup>105</sup>

101. *K. Palaniappa v. Valliammal*, AIR 1988 Mad 156; *State of Maharashtra v. National Construction Co.*, (1996) 1 SCC 735; AIR 1996 SC 2367; *Kewal Singh v. Lajwanti*, (1980) 1 SCC 290; AIR 1980 SC 161.

102. For detailed discussion of "Cause of action", see *infra*, Chap. 7.

103. *Gurbux Singh v. Bhooralal*, AIR 1964 SC 1810; (1964) 7 SCR 831; *Kewal Singh v. Lajwanti*, (1980) 1 SCC 290; AIR 1980 SC 161; *State of Maharashtra v. National Construction Co.*, (1996) 1 SCC 735.

104. *Code of Civil Procedure* (1995-96) Vol. II at p. 1056; see also *K V. George v. Water & Power Deptt.*, (1989) 4 SCC 595 at p. 601; AIR 1990 SC 53 at p. 58.

105. *Mohd. Khalil Khan v. Mahbub Ali Mian*, (1947-48) 75 IA 121; AIR 1949 PC 78; *Kewal Singh v. Lajwanti*, (1980) 1 SCC 290; AIR 1980 SC 161.

What the rule requires is the unity of all claims based on the same cause of action in one suit. It does not contemplate unity of distinct and separate causes of action. If the subsequent suit is based on a different cause of action, the rule will not operate.<sup>106</sup> The rule is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transaction.<sup>107</sup>

One of the tests is whether the claim in the subsequent suit is in fact founded upon a cause of action distinct from that which was the foundation of the former suit. If the answer is in the affirmative, the bar does not apply.<sup>108</sup>

Thus, where the rent of several years is in arrears and the plaintiff claims the rent of only one year, he cannot subsequently sue for the rent of other years. Similarly, a suit for specific performance of a contract bars a subsequent suit for damages for failure to perform the said contract. But the dismissal of a suit for specific performance of a contract to transfer land is no bar to a suit for the return of the consideration money. So also, a suit to eject the defendant on the basis of a lease is no bar to a suit based on title. The dismissal of a suit for enhancement of rent is no bar to a suit for recovery of rent originally fixed.

Like *res judicata*, a plea of bar of Order 2 Rule 2 must be established by the defendant by placing before the court, the plaint of the previous suit and other evidence for proving the identity of cause of action in both the suits. The court cannot take cognizance of such plea *suo motu*.<sup>109</sup>

## (ii) One of several reliefs

The rule applies only where the plaintiff is entitled to more than one relief in respect of the same cause of action and he omits to sue for all such reliefs.

Thus, where the plaintiff files a suit for damages for breach of contract and omits to claim a portion of damages for which he is entitled, a subsequent suit for such portion is barred. Similarly, a suit by a coparcener challenging the mortgage of certain coparcenary properties is a bar to a subsequent suit in respect of other properties included in the

106. *Arjun Lal v Mriganka Mohan*, (1974) 2 SCC 586 AIR 1975 SC 207 at p. 208, *State of M P v State of Maharashtra*, (1977) 2 SCC 288. AIR 1977 SC 1466, *Deva Ram v Ishwar Chand*, (1995) 6 SCC 733, *State of Maharashtra v National Construction Co.*, (1996) 1 SCC 735 AIR 1996 SC 2367.

107. *Payana Reena Saminathan v Pana Lana Palaniappa*, (1913-14) 41 IA 142 26 IC 228

108. *Keval Singh v Laxwanti*, (1980) 1 SCC 290 at p. 295 AIR 1980 SC 161 at p. 163, *State of Maharashtra v. National Construction Co.* (1996) 1 SCC 735 at p. 740 (SCC)

109. *Gurbux Singh v Bhooralal*, AIR 1964 SC 1810 (1964) 7 SCR 831, *Rikabdas v Deepak Jewellers*, (1999) 6 SCC 40

same mortgage transaction. Such relinquishment of claim need not be express. It may be implied in the conduct of the plaintiff.<sup>110</sup>

This rule, however, does not apply when the right to relief in respect of which a subsequent suit is brought, did not exist at the time of the previous suit<sup>111</sup>, or in the earlier suit the petitioner could not have claimed the relief which he sought in the subsequent suit.<sup>112</sup>

As stated by the Privy Council<sup>113</sup>, if a particular cause of action enables a person to ask for a larger and wider relief than that to which he limits his claim, he is precluded from claiming the balance by instituting independent proceedings. "The crux of the matter is presence or lack of awareness of the right at the time of the first suit." A right which a litigant did not know or a right which was not in existence at the time of the first suit, could hardly be regarded as a "portion of his claim" within the meaning of Order 2 Rule 2.<sup>114</sup>

### (iii) Leave of court

The rule applies only when leave of the court is not obtained. Therefore, if the omission has been with the permission of the court, the subsequent suit for the same relief in respect of the same cause of action is not barred. Such leave need not be express and it may be inferred from the circumstances of the case. It can be obtained at any stage.<sup>115</sup>

The power to grant leave is discretionary, and, normally, exercise of such discretion will not be interfered with by a superior court. The question whether leave should be granted or not will depend upon the facts and circumstances of each case and no rule of universal application can be laid down.<sup>116</sup>

### (i) Test

The test for finding out whether a subsequent suit be barred because of the previous suit is whether the claim in the second suit is in fact, founded on a cause of action which was the foundation of the former

110. *Shankar v. Balkrishna*, AIR 1954 SC 352; (1955) 1 SCR 99; *Sidramappa v. Rajashetty*, (1970) 1 SCC 186; AIR 1970 SC 1059; *Inacio Martins v. Narayan Hari Naik*, (1993) 3 SCC 123; AIR 1993 SC 1756.

111. *State of M.P. v. State of Maharashtra*, (1977) 2 SCC 288 at p. 295; AIR 1977 SC 1466 at p. 1472.

112. *Ibid*, see also *Sidramappa v. Rajashetty*, (1970) 1 SCC 186. AIR 1970 SC 1059.

113. *Mohd. Hafiz v. Mohd. Zakariya*, (1921-22) 49 IA 9; AIR 1922 PC 23; *Amanat Bibi v. Imdad Husain*, (1887-88) 15 IA 106; ILR (1888) 15 Cal 800 (PC).

114. *Anant Bibi v. Imdad Husain*, *ibid*.

115. *Hare Krishna v. Umesh Chandra*, AIR 1921 Pat 193 (FB).

116. *Krishnaji Ramchandra v. Raghunath Shankar*, AIR 1954 Bom 125; ILR 1954 Bom 187; *Hira Sharma v. Hakim Habibullah*, AIR 1979 Pat 232.

suit. If the answer is in the affirmative, the bar of Order 2 Rule 2 would apply. But if it is in the negative, it would not be attracted.<sup>117</sup>

### (j) Principles

In *Mohd. Khalil v. Mahbub Ali*,<sup>118</sup> after considering several cases on the point, the Privy Council laid down the following principles governing bar to a subsequent suit under this rule:

- (1) The correct test in cases falling under Order 2 Rule 2, is "whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation of the former suit".
- (2) The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment.
- (3) If the evidence to support the two claims is different, then the causes of action are also different.
- (4) The causes of action in the two suits may be considered to be the same if in substance they are identical.
- (5) The cause of action has no relation whatever to the defence that may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers ... to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour.<sup>119</sup>

### (k) Applicability to other proceedings

The provisions of Order 2 Rule 2 apply only to suits and not to appeals<sup>120</sup>, execution proceedings<sup>121</sup>, arbitration proceedings<sup>122</sup> or to a petition under Article 226 of the Constitution of India.<sup>123</sup>

117. *State of Maharashtra v. National Construction Co.*, (1996) 1 SCC 735; AIR 1996 SC 2637, *Kewal Singh v. Lajwanti*, (1980) 1 SCC 290. AIR 1980 SC 161

118. *Mohd. Khalil Khan v. Mahbub Ali Mian*, (1947-48) 75 IA 121 AIR 1949 PC 78.

119. *Ibid*, at p. 86 (AIR) (*per* Sir Madhavan Nair), see also *Dwarkadas v. Vimal*, AIR 1964 Bom 42; *Ram Deval v. Indrasan Kuer*, AIR 1964 Pat 452; *Haryana Coop. Sugar Mills Ltd. v. Gupta Drum Supply Co.*, AIR 1976 P&H 117, *C. Ramakrishnan v. Corpn. of Madras*, AIR 1976 Mad 128.

120. *M. Ramnarain (P) Ltd. v. State Trading Corpn.*, (1983) 3 SCC 75 at pp. 99-100; AIR 1983 SC 786 at p. 799.

121. *Sohan Raj v. Mahendra Singh*, AIR 1970 Raj 204

122. *Seth Kerorimall v. Union of India*, AIR 1964 Cal 545, *K V George v. Water & Power Deptt.*, (1989) 4 SCC 595; AIR 1990 SC 53

123. Expln. to S. 141 as added by the Amendment Act of 1976. See also *Devendra v. State of U P*, AIR 1962 SC 1334 at p. 1337; 1962 Supp (1) SCR 315; *Gulabchand v. State of Gujarat*, AIR 1965 SC 1153; (1965) 2 SCR 547

### **(l) Joinder of claims: Rules 4-5**

Rules 4 and 5 provide for joinder of claims. Rule 4 lays down that in a suit for the recovery of immovable property, a plaintiff is not entitled, without the leave of the court, to join any claim, except:

- (a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof;
- (b) claims for damages for breach of any contract under which the property or any part thereof is held; and
- (c) claims in which the relief sought is based on the same cause of action.

Rule 5 deals with suits by or against three classes of persons, viz., executors, administrators and heirs. It provides that no claim by or against the aforesaid persons in their representative capacity shall be joined with claims by or against them personally in the same suit, except:

- (a) where the personal claims arise with reference to the estate he represents; or
- (b) where he was entitled to or liable for, those claims jointly with the deceased whom he represents.

The primary object of these provisions is to prevent a representative from intermingling the assets of his testator with his own estates.

### **(m) Joinder of causes of action: Rules 3, 6**

Rule 3 deals with joinder of causes of action. This rule enables joinder of several causes of action in one suit in certain circumstances subject to the provisions of the Code. (Rules 4 and 5 of Order 2 and Rules 1 and 3 of Order 1.) It contemplates the following four types of situations:

#### **(i) One plaintiff, one defendant and several causes of action**

Where there is only one plaintiff and one defendant, the plaintiff is at liberty to unite in the same suit several causes of action. But if it appears to the court that the joinder of causes of action may embarrass or delay the trial or is otherwise inconvenient, the court may order separate trials.<sup>124</sup>

#### **(ii) Joinder of plaintiffs and causes of action**

Where there are two or more plaintiffs and several causes of action, the plaintiffs may unite such causes of action in one suit against the same defendant if they all are jointly interested. But this provision must be

124. R. 6.

read with Order 1 Rule 1. Thus, where there are two or more plaintiffs and two or more causes of action, they may be joined in one suit only if the following two conditions are fulfilled:

- (1) the causes of action must have arisen from the same act or transaction; and
- (2) common questions of law or fact must have been involved.

Therefore, where the plaintiffs are not jointly interested in several causes of action which have been joined in one suit and the right to relief does not arise from the same act or transaction or where common questions of law or fact are not involved, the suit will be bad for misjoinder of plaintiffs and causes of action.

### (iii) Joinder of defendants and causes of action

Where there is one plaintiff and two or more defendants and several causes of action, the plaintiff may unite in the same suit several causes of action against those defendants, if the defendants are jointly interested in the causes of action. But this provision also must be read subject to Order 1 Rule 3, and therefore, two or more defendants can be joined in one suit, provided the following two conditions are fulfilled:

- (1) the relief claimed must have been based on the same act or transaction; and
- (2) common questions of law or fact must have been involved.

Where, in one suit, two or more defendants have been joined against whom the causes of action are separate and therefore they are not jointly liable to the plaintiff in respect of those causes of action and the right to relief claimed is not based on the same act or transaction or where common questions of fact or law are not involved, the suit will be bad for misjoinder of defendants and causes of action, technically called as *multifariousness*.

### (iv) Joinder of plaintiffs, defendants and causes of action

Where there are two or more plaintiffs, two or more defendants and several causes of action, the plaintiffs may unite the causes of action against the defendants in the same suit only when all the plaintiffs are jointly interested in the causes of action and the defendants are also jointly interested in the causes of action. If the plaintiffs are not jointly interested in the causes of action, the suit will be bad for misjoinder of plaintiffs and causes of action. On the other hand, if the defendants are not jointly interested in the causes of action, the suit will be bad for *multifariousness*. And if neither the plaintiffs nor the defendants are jointly

interested in the causes of action, the suit will be bad for double misjoinder, i.e. misjoinder of plaintiffs and causes of action and misjoinder of defendants and causes of action.

#### (n) Objections as to misjoinder of causes of action: Rule 7

All objections on the ground of misjoinder of causes of action must be taken at the earliest opportunity, otherwise they will be deemed to have been waived.<sup>125</sup> Similarly, no decree or order under Section 47 of the Code can be reversed or substantially varied in appeal, *inter alia*, on account of any misjoinder or non-joinder of causes of action not affecting the merits of the case or the jurisdiction of the court.<sup>126</sup>

### 7. INSTITUTION OF SUIT: ORDER 4

#### (a) General

Section 26 and Order 4 provide for institution of suits. Order 1 deals with parties to a suit. It also contains provisions for addition, deletion and substitution of parties, joinder, non-joinder and misjoinder of parties and objection as to non-joinder and misjoinder. Order 2 lays down rules relating to frame of suit, splitting and joinder of claims, joinder of causes of action and objections as to misjoinder.

#### (b) Complaint: Meaning

The expression "complaint" has not been defined in the Code, but it means "a private memorial tendered to a court in which a person sets forth his cause of action; the exhibition of an action in writing."<sup>127</sup>

#### (c) Presentation of complaint: Section 26; Order 4 Rule 1

Every suit must be instituted by the presentation of a complaint in duplicate or in such other manner as may be prescribed by the Code<sup>128</sup> by the plaintiff himself or by his advocate or by his recognised agent or by any person duly authorised by him.<sup>129</sup> Therefore, generally, a proceeding which does not commence with a complaint is not a "suit".<sup>130</sup>

125. R. 7.

126. Ss. 99 & 99-A.

127. *Assan v. Pathumma*, ILR (1899) 22 Mad 494.

128. Ss. 26, 2(16); Or. 4 R. 1.

129. *Basanta Kumar v. Lakshma Moni*, AIR 1968 Ass 57; *Ramgopal v. Ramsarup*, AIR 1934 Bom 91 (1934) 36 Bom LR 84; *Basdev v. Krishna Kumar*, AIR 1953 Punj 160, *Barkata v. Feroze Khan*, AIR 1944 Lah 131.

130. *Secy. of State v. Kundan Singh*, AIR 1932 Lah 374.

### (d) Time and place of presentation

A plaint must be presented to the court or such officer as it appoints in that behalf.<sup>131</sup> Generally, the presentation of a plaint must be on a working day and during the office hours. However, there is no rule that such presentation must be made either at a particular place or at a particular time. A judge, therefore, may accept a plaint at his residence or at any other place even after office hours, though he is not bound to accept it. But if not too inconvenient, the judge must accept the plaint, if it is the last day of limitation.<sup>132</sup> Thereafter, the particulars of a suit will be entered by the court in a book kept for the said purpose, called the register of civil suits.<sup>133</sup> After the presentation, the plaint will be scrutinized by the Stamp Reporter. If there are defects, the plaintiff or his advocate will remove them. Thereafter the suit will be numbered.<sup>134</sup>

### (e) Particulars in plaint

Every plaint must contain necessary particulars.<sup>135</sup>

### (f) Register of suits

Particulars of every suit will be entered in the register of civil suits.<sup>136</sup> After the plaint is presented, it will be scrutinized by the Stamp Reporter. If there are defects, they will be removed by the plaintiff or his advocate. The suit will thereafter be numbered.<sup>137</sup>

### (g) Suit by indigent persons

Order 33 of the Code deals with suits by indigent persons (paupers).<sup>138</sup>

131. R. 1(1); see also *Kalyan Singh v. Baldev Singh*, AIR 1961 HP 2.

132. *Pindukuru Balaram Reddy v. Jaladanki Venkatasubbaiah*, AIR 1965 AP 386 at pp. 387-88; *Thakur Din Ram v. Haridas*, ILR (1912) 34 All 482 (FB), *Sattayya Padayaci v. Soundarathachi*, AIR 1924 Mad 448 (FB), *Patna College v. Kalyan Srinivas*, AIR 1966 SC 707 (1966) 1 SCR 974, *Alok Kumar Roy v. Dr. S. N. Sarma*, AIR 1968 SC 453 (1968) 1 SCR 813; *Kisanlal v. Mohan Chandmal*, AIR 1971 Bom 410.

133. R. 2.

134. *Ramgopal v. Ramsarup* AIR 1934 Bom 91, *Union Bank of India v. Sunpac Corpn.*, AIR 1986 Bom 353 (1986) 88 Bom LR 148 1986 Mah LJ 237.

135. For detailed discussion, see *infra*, Chap. 7.

136. Or. 4 R. 2.

137. *Union Bank of India v. Sunpac Corpn.*, AIR 1986 Bom 353 (1986) 88 Bom LR 148 1986 Mah LJ 237.

138. For detailed discussion, see *infra*, Chap. 16.

### (h) Suit against minor

A suit against a minor can be said to have been instituted when a plaint is presented and not when a guardian *ad litem* is appointed.<sup>139</sup>

### (i) Suit against dead person

According to one view, a suit against a person who is dead at the time of institution thereof is *non est* and of no legal effect. According to the other view, however, such suit is not void *ab initio* and can be continued against legal representatives of deceased defendant if they have been brought on record in accordance with law. Thus, if a suit is filed against a dead person by the plaintiff without the knowledge about the death of the defendant and takes prompt action as soon as he comes to know about such death, then he cannot be deprived of his remedy against the legal representatives of the deceased defendant.<sup>140</sup>

139. *Ibid.*

140. For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. III at pp. 268-69.

# CHAPTER 6

## Pleadings

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### 1. GENERAL

Order 6 deals with pleadings in general. Rule 1 defines pleading, while Rule 2 lays down the fundamental principles of pleadings. Rules 3 to 13 require the parties to supply necessary particulars. Rules 14 and 15 provide for signing and verification of pleadings. Rule 16 empowers a court

to strike out unnecessary pleadings. Rules 17 and 18 contain provisions relating to amendment of pleadings

## 2. PLEADING: DEFINITION: RULE 1

"Pleading" is defined as plaint or written statement.<sup>1</sup> According to Mogha,<sup>2</sup> "Pleadings are statements in writing drawn up and filed by each party to a case, stating what his contentions will be at the trial and giving all such details as his opponent needs to know in order to prepare his case in answer."

A plaintiff's pleading is his plaint, a statement of claim in which the plaintiff sets out his cause of action with all necessary particulars<sup>3</sup>, and a defendant's pleading is his written statement, a defence in which the defendant deals with every material fact alleged by the plaintiff in the plaint and also states any new facts which are in his favour, adding such legal objections as he wishes to take to the claim.<sup>4</sup> Where the defendant, in his written statement, pleads a set-off, the plaintiff may file his written statement thereto. Again, in some cases, the defendant after filing his written statement may file an additional written statement with the leave of the court.

## 3. OBJECT

The whole object of pleadings is to bring parties to definite issues and to diminish expense and delay and to prevent surprise at the hearing. A party is entitled to know the case of his opponent so that he can meet it. In other words, the sole object of pleadings is to ascertain the real disputes between the parties, to narrow down the area of conflict and to see where the two sides differ, to preclude one party from taking the other by surprise and to prevent miscarriage of justice.<sup>5</sup>

In the leading case of *Throp v. Holdsworth*<sup>6</sup>, Jessel, M.R. stated:

"The whole object of pleadings is to bring parties to an issue, and the meaning of the rules (relating to pleadings) was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In

1 Or 6 R. 1; see also *Bharat Singh v. State of Haryana*, (1988) 4 SCC 534; AIR 1988 SC 2181.

2 *Mogha's Law of Pleadings* (1983) at p. 1

3 *Ibid*, for detailed discussion of "Plaint" see *infra*, Chap. 7

4 *Ibid*, for detailed discussion of "Written statement", see *infra*, Chap. 7

5 *Throp v. Holdsworth*, (1876) 3 Ch D 637; *Someshwar Dutt v. Tribhawan Dutt*, (1933-34) 61 IA 224. AIR 1934 PC 130. 149 IC 480; *J.K. Iron and Steel Co. Ltd. v. Mazdoor Union*, AIR 1956 SC 231 at p. 235 (1955) 2 SCR 1315; *Ram Sarup v. Bishnu Naram Inter College*, (1987) 2 SCC 555; AIR 1987 SC 1242.

6. (1876) 3 Ch D 637.

*fact, the whole meaning of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."*<sup>7</sup> (emphasis supplied)

In *Sayad Muhammad v. Fatteh Muhammad*<sup>8</sup>, Lord Halsbury said:

"Whatever system of pleading may exist, the sole object of it is that each side may be fully alive to the questions that are about to be argued in order that they may have opportunity of bringing forward such evidence as may be appropriate to the issues."<sup>9</sup>

In *Ganesh Trading Co. v. Moji Ram*<sup>10</sup>, the Supreme Court observed, "Provisions relating to pleadings in civil cases are meant to give to each side intimation of the case of the other so that it may be met to enable courts to determine what is really at issue between parties, and to prevent deviations from the course which litigation on particular causes of action must take."<sup>11</sup>

In *Virendra Kashinath v. Vinayak N. Joshi*<sup>12</sup>, the Supreme Court stated, "The object of the rule is twofold. *First* is to afford the other side intimation regarding the particular facts of his case so that they may be met by the other side. *Second* is to enable the court to determine what is really the issue between the parties."<sup>13</sup>

#### 4. IMPORTANCE

Importance of pleadings cannot be underestimated.

Jacob<sup>14</sup> states, "Pleadings do not only define the issues between the parties for the final decision of the court at the trial, they manifest and exert their importance throughout the whole process of the litigation."

Pleadings provide a guide for the proper mode of trial. They demonstrate upon which party the burden of proof lies, and who has the right to open the case. They also determine the range of admissible evidence

7. *Ibid.*, at p. 639; see also, the following observations of Lord Halsbury in *Sayad Muhammad v. Fatteh Muhammad*, (1894-95) 22 IA 4: ILR (1894) 22 Cal 324 (PC) "Whatever system of pleading may exist, the sole object of it is that each side may be fully alive to the questions that are about to be argued in order that they may have opportunity of bringing forward such evidence as may be appropriate to the issues."

8. (1894-95) 22 IA 4: ILR (1894) 22 Cal 324 (PC)

9. *Ibid.*, at p. 331 (Cal)

10. (1978) 2 SCC 91 AIR 1978 SC 484

11. *Ibid.*, at p. 93 (SCC) at pp. 485-86 (AIR) See also *Sayad Muhammad v. Fatteh Muhammad* (1894-95) 22 IA 4: ILR (1894) 22 Cal 324 (PC)

12. (1999) 1 SCC 47 AIR 1999 SC 162

13. *Ibid.* at p. 52 (SCC) at p. 165 (AIR)

14. *The Present Importance of Pleadings* (1960) at pp. 75-76, Buxton, Leake and Jacob, *Precedents and Pleadings*, Mogha's Law of Pleadings, *supra*

which the parties should adduce at the trial. They also lay down limit on the relief that can be granted by the court.

## 5. BASIC RULES OF PLEADINGS: RULE 2

Sub-rule (1) of Rule 2 lays down the fundamental principles of pleadings. It reads as under:

2(1). Every pleading shall contain, and contain only a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.

On analysis, the following general principles emerge:

- (i) Pleadings should state facts and not law;
- (ii) The facts stated should be material facts;
- (iii) Pleadings should not state the evidence; and
- (iv) The facts should be stated in a concise form.

Let us discuss these principles in detail:

### (1) Facts and not law

The first principle of pleadings is that they should state *only* facts and not law. It is the duty of the parties to state only the facts on which they rely upon for their claims. It is for the court to apply the law to the facts pleaded.<sup>15</sup>

The law of pleading may be tersely summarised in four words; "Plead facts not law."<sup>16</sup>

Thus, existence of a custom or usage is a question of fact which must be specifically pleaded. Similarly, intention is also a question of fact and it must be pleaded.

Again, waiver or negligence is a plea of fact and must be pleaded in the pleading.

But a plea about maintainability of the suit raises a question of law and need not be pleaded.<sup>17</sup> Likewise, when Hindu sons are sued for a debt incurred by their deceased father, it is not necessary to formulate in the plaint the Hindu Law as to the pious obligation of Hindu sons to pay their father's debt. Legal consequences which flow from facts also need not be stated in the pleading. So also, inferences of law to

15. *Kedar Lal v. Hari Lal*, AIR 1952 SC 47 at p. 51: 1952 SCR 179; *Manoj v. Shanti*, (1997) 1 SCC 553; AIR 1997 SC 2153, *Lakhi Ram v. Trikha Ram*, (1998) 2 SCC 720: AIR 1998 SC 1230; *Syed Dastagir v. T.R. Gopalkrishna Setty*, (1999) 6 SCC 337: AIR 1999 SC 3029.

16. *Gouri Dutt Ganesh Lal Firm v. Madho Prasad*, AIR 1943 PC 147: 209 IC 192.

17. *State of Rajasthan v. Rao Raja Kalyan Singh*, (1972) 4 SCC 165. AIR 1971 SC 2018 at p. 2019.

be drawn from pleaded facts need not be stated in the pleading. "The practice of courts is to consider and deal with the legal result of pleaded facts, although the particular result is not stated in the pleading".<sup>18</sup> A construction or interpretation of a document, being a point of law, need not be pleaded.

This is based on the principle that a judge is bound to apply correct law even if incorrect law is pleaded by a party.

A mixed question of law and fact, however, should be specifically pleaded.<sup>19</sup> Similarly, a point of law which is required to be substantiated by facts, should be pleaded with necessary facts.<sup>20</sup>

## (2) Material facts

The second principle of pleadings is that they should contain a statement of material facts and material facts only. Though the expression "material facts" has not been defined in the Code, it means all facts upon which the plaintiff's cause of action or the defendant's defence depends, or, in other words, all those facts which must be proved in order to establish the plaintiff's right to relief claimed in the plaint or the defendant's defence in the written statement.<sup>21</sup>

In *Udhav Singh v. Madhav Rao Scindia*<sup>22</sup>, the Supreme Court has defined the expression "material facts" in the following words:

"All the primary facts which must be proved at the trial by a party to establish the existence of a cause of action or his defence are material facts."<sup>23</sup>

Recently, in *Virender Nath v. Satpal Singh*,<sup>24</sup> the Supreme Court stated:

"The phrase 'material facts' may be said to be those facts upon which a party relies for his claim or defence. In other words, 'material facts' are facts upon which the plaintiff's cause of action or the defendant's defence depends. What particulars could be said to be 'material facts' would depend upon the facts of each case and no rule of universal application can be laid down. It is, however, absolutely essential that all basic and primary facts which must be proved at the trial by the party to establish the existence of a

18 *Bell v Lever Bros Ltd*, (1931) 1 KB 557

19 *Ram Prasad v State of M P* (1969) 3 SCC 24. AIR 1970 SC 1818.

20. *H D Vashishta v Glaxo Laboratories*, (1978) 1 SCC 170. AIR 1979 SC 134. *Union of India v Sita Ram*, (1976) 4 SCC 505. AIR 1977 SC 329.

21. *Union of India v Sita Ram Jaiswal*, (1976) 4 SCC 505. AIR 1977 SC 329. *Brahma Parkash v Manbir Singh*, AIR 1963 SC 1607. 1964 SCD 485. *Calcutta Discount Co Ltd v ITC*, AIR 1961 SC 372. (1961) 2 SCR 241.

22 (1977) 1 SCC 431. AIR 1976 SC 744.

23 *Ibid*, at p 523 (SCC) 752 (AIR). See also *Mohan Rawale v Damodar Tatvaha*, (1994) 2 SCC 392 at p 398, *Gnanan Krishnan v Dattaji Raghobaji* (1995) 5 SCC 347. AIR 1995 SC 2284. *Mogha* *supra* at p 22.

24 (2007) 3 SCC 61. AIR 2007 SC 581.

*cause of action or defence are material facts and must be stated in the pleading by the party.*<sup>25</sup> (emphasis supplied)

The distinction between "material facts" and "particulars" cannot be overlooked. Material facts are primary and basic facts which must be pleaded by the party in support of the case set up by it. Since the object and purpose is to enable the opposite party to know the case it has to meet, in absence of pleading, a party cannot be allowed to lead evidence. Failure to state material facts, hence, will entail dismissal of the suit. Particulars, on the other hand, are the details of the case. They amplify, refine and embellish material facts. They give the finishing touch to the basic contours of a picture already drawn so as to make it full, more detailed and more informative. Thus, the distinction between "material facts" and "particulars" is one of degree.<sup>26</sup>

In *Virender Nath v. Satpal Singh*,<sup>27</sup> the Supreme Court said:

"A distinction between 'material facts' and 'particulars', however, must not be overlooked. 'Material facts' are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of the case set up by him either to prove his cause of action or defence. 'Particulars', on the other hand, are details in support of material facts pleaded by the party. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. 'Particulars' thus ensure conduct of fair trial and would not take the opposite party by surprise."<sup>28</sup>

(emphasis supplied)

Whether a particular fact is or is not a material fact which is required to be pleaded by a party depends on the facts and circumstances of each case.<sup>29</sup>

All material facts must appear in the pleadings and the necessary particulars must be there so as to enable the opposite party to know the case he is required to meet and to put him on his guard. The rule is not of mere technicality and, therefore, if a party omits to state material facts, it would mean that the plea has not been raised at all and the court will not allow the party to lead evidence of that fact at the trial, unless the court gives that party leave to amend his pleadings. The

25. *Ibid*, at p. 628 (SCC) (*per* Thakker, J.), see also *Harkirat Singh v. Amrinder Singh*, (2005) 13 SCC 511.

26. *D. Ramachandran v. R.V. Janakiraman*, (1999) 3 SCC 267; AIR 1999 SC 1128; *Udhav Singh v. Madhav Rao Scindia*, (1977) 1 SCC 511; AIR 1976 SC 744.

27. (2007) 3 SCC 617; AIR 2007 SC 581.

28. *Ibid*, at p. 629 (SCC) (*per* Thakker, J.); see also *Harkirat Singh v. Amrinder Singh*, (2005) 13 SCC 511.

29. *Virender Nath v. Satpal Singh*, (2007) 3 SCC 617; *Ramachandran v. Janakiraman*, (1999) 3 SCC 267; *Udhav Singh v. Madhav Rao Scindia*, (1977) 1 SCC 511; *Gajanan Krishnaji. Dattaji Raghobaji*, (1995) 5 SCC 347; AIR 1995 SC 2284, *Charan Lal Sahu v. Giani Zail Singh*, (1984) 1 SCC 390; AIR 1984 SC 309, *Calcutta Discount Co. Ltd v. ITO*, AIR 1961 SC 372; (1961) 2 SCR 241.

reason is that non-mention of material facts amounts to non-pleading and, therefore, no cause of action arises in favour of such party.

What particulars are to be stated depends upon the facts of each case, but it is absolutely essential that the pleading, not to be embarrassing to the defendant, should state those facts which will put his opponents on their guard and tell them what they have to meet when the case comes up for trial.<sup>30</sup>

Thus, it has been held that a plaintiff, filing a suit on the basis of title, must state the nature of the deeds on which he relies in deducing his title. Similarly, a party relying upon the fact that the notice of dishonour is not necessary, or that the woman claiming maintenance has lost her right on account of her incontinence, or that the person who has signed the plaint in a suit by a corporate body has authority under the Code, is bound to allege those facts in his pleadings.

### (3) Facts and not evidence

The third principle of pleadings is that the evidence of facts, as distinguished from the facts themselves, need not be pleaded. In other words, the pleadings should contain a statement of material facts on which the party relies but not the evidence by which those facts are to be proved.<sup>31</sup>

The facts are of two types:

- (a) *Facta probanda*—the facts required to be proved (material facts); and
- (b) *Facta probantia*—the facts by means of which they are to be proved (particulars or evidence).

The pleadings should contain only *facta probanda* and not *facta probantia*. The material facts on which the plaintiff relies for his claim or the defendant relies for his defence are called *facta probanda*, and they must be stated in the plaint or in the written statement, as the case may be. But the facts or evidence by means of which the material facts are to be proved are called *facta probantia* and need not be stated in the pleadings. They are not the "fact in issue", but only relevant facts required to be proved at the trial in order to establish the fact in issue.

As observed by Lord Denman, C.J.,<sup>32</sup> "It is an elementary rule in pleading, that, when a state of facts is relied on, it is enough to allege it

30. *Ibid*, see also *Charan Lal Sahu v Giani Zail Singh*, (1984) 1 SCC 390 at pp 405-06 AIR 1984 SC 309 at p 317, *Mohan Rawale v Damodar Tatyaba*, (1994) 2 SCC 392, Bullen, Leake and Jacob, *Precedents of Pleadings* (1975) at p 112

31. *R M Seshadri v G Vasantha Pai*, (1969) 1 SCC 27 at pp 34-35 AIR 1969 SC 692 at p. 699; *Manphul Singh v Surinder Singh*, (1973) 2 SCC 599 at p 608 AIR 1973 SC 2158 at pp. 2164-65; *Khushalbhai Mahipbhai v Firm of Mohmadhussain Rahimbux*, 1980 Supp SCC 1 AIR 1981 SC 977

32. *Williams v Wilcox*, 112 ER 857 (1835-42) All ER Rep 25 (1838) 8 Ad&El 314 at p 331

simply, without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation."

Brett, L.J.<sup>33</sup> also stated, "I will not say that it is easy to express in words what are facts which must be stated and what matters need not be stated . . . . The distinction is taken in the very rule itself, between the facts on which the party relies and the evidence to prove those facts . . . . The facts which ought to be stated are the material facts on which the party pleading relies." (emphasis supplied)

In *Virender Nath v. Satpal Singh*<sup>34</sup>, after referring the leading English and Indian decisions on the point, the Supreme Court observed:

"There is distinction between *facta probanda* (the facts required to be proved i.e. material facts) and *facta probantia* (the facts by means of which they are proved i.e. particulars or evidence). It is settled law that pleadings must contain only *facta probanda* and not *facta probantia*. The material facts on which the party relies for his claim are called *facta probanda* and they must be stated in the pleadings. But the fact or facts by means of which *facta probanda* (material facts) are proved and which are in the nature of *facta probantia* (particulars or evidence) need not be set out in the pleadings. They are not 'fact in issue', but only relevant facts required to be proved at the trial in order to establish the fact in issue."<sup>35</sup>

The aforesaid principle is well illustrated in the case of *Borrodaile v. Hunter*<sup>36</sup>. A was insured with an insurance company. One of the terms of the policy was that the policy would be void if the insured committed suicide. A actually committed suicide by shooting himself with a pistol and thereupon an action was brought against the company on the policy. The company should only plead that A committed suicide. This is *facta probanda*. Other facts, that A was melancholy for weeks, that he bought a pistol a day before his death, shot himself with the said pistol and that a letter was found with him addressed to his wife stating that he intended to kill himself—all these facts are *facta probantia* and they need not be pleaded. Similarly, it is wrong to set out admission made by the opposite party in the pleading, as that fact is only evidence.

Thus, in an election petition the plea that cars were used by the successful candidate for the purpose of conveying voters contrary to the Act must be stated in the pleadings since it is a fact in issue (*facta probanda*). But the facts as to from where the cars were obtained, who hired them and used them for conveyance of voters are merely evidentiary facts (*facta probantia*) and need not be stated in the pleadings.<sup>37</sup>

33. *Philipps v. Philipps*, (1878) 4 QB 127 at p. 133; (1874-80) All ER Rep Ext 1684 (CA).

34. (2007) 3 SCC 617; AIR 2007 SC 581.

35. *Ibid*, at pp. 631-32 (SCC) (*per* Thakker, J.); see also *Harkirat Singh v. Amrinder Singh*, (2005) 13 SCC 511.

36. (1845) 5 M&G 639.

37. *Virender Nath v. Satpal Singh*, (2007) 3 SCC 617; AIR 2007 SC 581; *R M. Seshadri v. G. Vasantha Pai*, (1969) 1 SCC 27.

It is, however, not easy to express in words what are the facts which must be stated in the pleadings and what are the matters which need not be so set out. The question must be decided in the light of facts and circumstances of each case.<sup>38</sup> To put it differently, the dividing line between these two classes of facts (*facta probanda* and *facta probantia*) is often very difficult to draw; but a fact as to which there is a doubt as to whether it should be placed in the one class or the other should be pleaded.<sup>39</sup>

#### (4) Concise form

The fourth and the last general principle of pleadings is that the pleadings should be drafted with sufficient brevity and precision. The material facts should be stated precisely succinctly and coherently.

The importance of a specific pleading can be appreciated only if it is realised that the absence of a specific plea puts the defendant at a great disadvantage. He must know what case he has to meet. He cannot be kept guessing what the plaintiff wants to convey by a vague pleading. Therefore, the pleading must be precise, specific and unambiguous. A party cannot be allowed to keep his options open until the trial and adduce such evidence as seems convenient and handy.<sup>40</sup>

The words "in a concise form" are definitely suggestive of the fact that brevity should be adhered to while drafting pleadings. Of course, brevity should not be at the cost of excluding necessary facts, but it does not mean niggling in the pleadings. *If care is taken in syntactic process, pleadings can be saved from tautology.*<sup>41</sup> (emphasis supplied)

Every pleading should be divided into paragraphs and sub-paragraphs. Each allegation should be contained in a separate paragraph. Dates, totals and numbers must be mentioned in figures as well as in words.<sup>42</sup> Rule 3 lays down that forms in Appendix A of the Code should be used where they are applicable; and where they are not applicable, forms of like character should be used.

The facts must be pleaded with certainty. In other words, they should be definitely stated as facts, and should not be left to be inferred from vague or ambiguous expressions. All material facts must be stated in a

38. *Philipps v. Philipps*, (1878) 4 QB 127, *Mohan Rawale v. Damodar Tatuaba*, (1994) 2 SCC 392

39. *Millington v Loring* (1880) 6 QB 190 (CA)

40. *Charan Lal Sahu v. Giant Zail Singh*, (1984) 1 SCC 390 at pp. 405-06 AIR 1984 SC 309 at p. 317

41. *Virendra Kashinath v. Vinayak N. Joshi* (1999) 1 SCC 47 at p. 52 AIR 1999 SC 162 at p. 165 ("Elaboration of facts in pleading is not the ideal measure and that is why the sub-rule embodies the words 'and contain only just before the succeeding words 'a statement in a concise form of the material facts'")

42. R. 2(2), (3)

summary form, as briefly as the nature of the case requires. Immaterial averments and unnecessary details must be omitted and material allegations and necessary particulars must be included.

## 6. OTHER RULES OF PLEADINGS: RULES 4-18

Over and above the aforesaid basic rules, there are other rules of pleadings dealing with cases of a special nature. They have been laid down in Rules 4 to 18 of Order 6. They may be summarised thus:

(1) Wherever misrepresentation, fraud, breach of trust, wilful default or undue influence are pleaded in the pleadings, particulars with dates and items should be stated.<sup>43</sup>

In *Bishundeo Narain v. Seogeni Rai*<sup>44</sup>, the Supreme Court observed:

"Now if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud which any court ought to take notice of, however strong the language in which they are couched may be, and the same applies to undue influence and coercion."<sup>45</sup>

What particulars are to be set out in the pleadings must depend upon the facts of each case. As a general rule, so much certainty and particularity should be insisted upon as is reasonable, having regard to the circumstances and the nature of the acts. "To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."<sup>46</sup>

(2) As stated above, the object of pleading is to bring the parties to a trial by concentrating their attention on the matter in dispute, so as to narrow the controversy to precise issues and to give notice to the parties of the nature of testimony required on either side in support of their respective cases. A vague or general plea can never serve this purpose. Rule 4 has been evolved with a view to narrow the issue and protect the party charged with improper conduct from being taken by surprise. Therefore, if the particulars stated in the pleading are not sufficient and specific, the court should, before proceeding with the trial of

43. R. 4.

44. AIR 1951 SC 280; 1951 SCR 548.

45. *Ibid.*, at p. 283 (AIR), at p. 556 (SCR), see also *Bharat Dharma Syndicate Ltd. v. Harish Chandra*, (1936-37) 64 IA 143; AIR 1937 PC 146; 168 IC 620; *Ladli Prashad v. Karnal Distillery Co. Ltd.*, AIR 1963 SC 1279; (1964) 1 SCR 270; *Bijendra Nath v. Mayank Srivastava*, (1994) 6 SCC 117; AIR 1994 SC 2562.

46. *Ratcliffe v. Evans*, (1892) 2 QB 524 at p. 532; 61 LJ QB 535.

the suit, insist upon the particulars, which give adequate notice to the other side of the case intended to be set up.<sup>47</sup>

(3) The performance of a condition precedent need not be pleaded since it is implied in the pleadings. Non-performance of a condition precedent, however, must be specifically and expressly pleaded.<sup>48</sup>

(4) Generally departure from pleading is not permissible, and except by way of amendment, no party can raise any ground of claim or contain any allegation of fact inconsistent with his previous pleadings.<sup>49</sup>

(5) A bare denial of a contract by the opposite party will be construed only as a denial of *factum* of a contract and not the legality, validity or enforceability of such contract.<sup>50</sup>

(6) Documents need not be set out at length in the pleadings unless the words therein are material.<sup>51</sup>

(7) Wherever malice, fraudulent intention, knowledge or other condition of the mind of a person is material, it may be alleged in the pleading only as a fact without setting out the circumstances from which it is to be inferred.<sup>52</sup> Such circumstances really constitute evidence in proof of material facts.

(8) Whenever giving of notice to any person is necessary or a condition precedent, pleadings should only state regarding giving of such notice, without setting out the form or precise terms of such notice or the circumstances from which it is to be inferred, unless they are material.<sup>53</sup>

(9) Implied contracts or relations between persons may be alleged as a fact, and the series of letters, conversations and the circumstances from which they are to be inferred should be pleaded generally.<sup>54</sup>

(10) Facts which the law presumes in favour of a party or as to which the burden of proof lies upon the other side need not be pleaded.<sup>55</sup>

(11) Every pleading should be signed by the party or one of the parties or by his pleader.<sup>56</sup>

(12) A party to the suit should supply his address. He should also supply address of the opposite party.<sup>57</sup>

(13) Every pleading should be verified on affidavit by the party or by one of the parties or by a person acquainted with the facts of the case.<sup>58</sup>

47 *Ladli Prashad v. Karnal Distillery Co. Ltd.*, AIR 1963 SC 1279 at p. 1288 (AIR)

48 R 6

49 R 7. See also *infra*, "Alternative and inconsistent pleadings"

50 R 8. See also *Kalyanpur Lime Works Ltd. v. State of Bihar*, AIR 1954 SC 165, 1954 SCR 958

51 R 9

52 R 10

53 R 11.

54 R 12

55 R 13

56 R 14 For detailed discussion, see *infra* "Signing and verification of pleadings"

57 R 14-A See also *ibid.* 58 R 15 See also *ibid.*

(14) A court may order striking out a pleading if it is unnecessary, scandalous, frivolous, vexatious or tends to prejudice, embarrass or delay fair trial of the suit.<sup>59</sup>

(15) A court may allow amendment of pleadings.<sup>60</sup>

(16) Forms in Appendix A of the Code should be used wherever they are applicable. Where they are not applicable, forms of like nature should be used.<sup>61</sup>

(17) Every pleading should be divided into paragraphs, numbered consecutively. Each allegation or averment should be stated in a separate paragraph.<sup>62</sup>

(18) Dates, totals and numbers should be written in figures as well as in words.<sup>63</sup>

## 7. FORMS OF PLEADING

Averments in pleadings should conform with the forms in Appendix A to the (First) Schedule. But the forms in Appendix A are not statutory. Non-compliance thereof, hence, would not result in dismissal of the suit. A party will not be non-suited on that ground.<sup>64</sup>

## 8. PLEADING IN WRIT PETITIONS

There is essential distinction between pleading under the Code and a pleading under Article 32 or 226 of the Constitution.

Under the Code, every pleading (plaint or written statement) should state only material facts and not evidence. In a writ petition, on the other hand, the petitioner, or in a counter-affidavit, the respondent, should not only state material facts but also the evidence in support and proof of such facts by annexing necessary orders and documents.<sup>65</sup>

## 9. ALTERNATIVE AND INCONSISTENT PLEADINGS

The expression "alternative" means the one or the other of two things. It conveys a choice. A party to a litigation may include in his pleadings two or more sets of facts and claim relief in the alternative.

"Inconsistent", on the other hand, means mutually repugnant, contradictory, irreconcilable or destructive. One is contrary to the other.

59. R. 16. For detailed discussion, see *infra*, "Striking out pleadings".

60. R. 17. For detailed discussion, see *infra*, "Amendment of pleadings".

61. R. 3. 62. R. 2(2). 63. R. 2(3).

64. *R.C. Chandiok v. Chuni Lal*, (1970) 3 SCC 140; AIR 1971 SC 1238.

65. *Bharat Singh v. State of Haryana*, (1988) 4 SCC 534; AIR 1988 SC 2181.

Both, therefore, cannot stand. Acceptance or establishment of one necessarily implies abrogation or abandonment of the other.

There is nothing in the Code to prevent the plaintiff from relying upon several different reliefs in the alternative or to prevent the defendant from raising several different defences in the alternative.

As observed by Lindley, L.J.:<sup>66</sup>

"A person may rely upon one set of facts, if he can succeed in proving them, and he may rely upon another set of facts if he can succeed in proving them; and it appears to me to be a far too strict a construction of this Order to say that he must make up his mind on which particular line he will put his case, when perhaps he is very much in the dark."<sup>67</sup> (emphasis supplied)

The underlying object of allowing alternative pleas and permitting alternative reliefs to be claimed in one litigation is to obviate the necessity of another litigation and to decide the entire controversy in one litigation only.<sup>68</sup>

Thus, a suit for possession of property is maintainable on the basis of title or in the alternative on the basis of lease. Similarly, a landlord can file a suit for eviction of his tenant on the ground of personal requirement or in the alternative on the ground of non-payment of rent. Likewise, a prayer for specific performance of an agreement or, in the alternative, a prayer for damages or compensation can be made.<sup>69</sup> Again, in a petition for restitution of conjugal rights, an alternative prayer for divorce is not barred.<sup>70</sup>

The Code does not prohibit a party from making two or more inconsistent sets of allegations.<sup>71</sup> A plaintiff may rely on several different rights alternatively, although they may be inconsistent, so also a defendant may raise by his statement of defence, without leave of the court, as many distinct and separate inconsistent defences as he may

66. *Morgan, Re*, (1887) 35 Ch D 492 (CA), see also *Philipps v. Philipps*, (1878) 4 QB 127.

67. *Ibid*, at p. 499. Suppose A is accused of breaking a school-room window. A's defence may run thus: "In the first place, sir, the school room has no window. In the second place, the school room window is not broken. In the third place, if it is broken, I did not do it. In the fourth place, it was an accident." All these defences are permissible. First three are traverses, whereas the last is a confessional one. [Glanville Williams, *Learning of the Law* (11th Edn) at pp. 20-21]

68. *Firm Srinivas Ram Kumar v. Mahabir Prasad*, AIR 1951 SC 177, 1951 SCR 277.

69. *Jagdish Singh v. Natthu Singh*, (1992) 1 SCC 647, AIR 1992 SC 1604.

70. *Krishna Devi v. Add. Civil Judge, Buncor*, AIR 1985 All 131.

71. *Bhuban Mohini v. Kumud Bala*, AIR 1924 Cal 467 (1923-24) 28 CWN 131, 82 IC 934, *Ardeshr Mama v. Flora Sassoon*, (1927-28) 55 IA 360, AIR 1928 PC 208, 111 IC 413, *Firm Srinivas Ram Kumar v. Mahabir Prasad*, AIR 1951 SC 177, 1951 SCR 277, *Chapsibhai v. Purushottam*, (1971) 2 SCC 205 at pp. 213-14, AIR 1971 SC 1878 at p. 1885, *Modi Spg. & Wvg. Mills Co. Ltd. v. Latha Ram*, (1976) 4 SCC 320 at p. 321, AIR 1977 SC 680, *P. M. C. Kunhiraman Nair v. C. R. Naganatha Iyer*, (1992) 4 SCC 254, AIR 1993 SC 307, *Basavan Jaggu Dhobi v. Sukhanandan*, 1995 Supp. (3) SCC 179, *Arundhati Mishra v. Ram Charitra Pandey*, (1994) 2 SCC 29, *Akshaya Restaurant v. P. Anjanappa*, 1995 Supp. (2) SCC 303, AIR 1995 SC 1498, *G. Nagamma v. Siromanamma*, (1996) 2 SCC 25.

think proper. It is open to the parties to raise even mutually inconsistent pleas and if relief could be founded on the alternative plea it could be granted.<sup>72</sup> This is, however, subject to the provision that such pleading does not prejudice or embarrass fair trial of the suit. But a pleading is not embarrassing merely because it sets up an inconsistent set of facts or irreconcilable pleas.

Thus, a claim of ownership or in the alternative a right of pre-emption; or a plea of forgery or in the alternative a plea of execution under undue influence or fraud; or a plea of grant of perpetual tenancy or in the alternative a plea of adverse possession can be taken.

Though inconsistent pleas are not impermissible, they are seen with suspicion by the court and the party really takes risk in adopting this method of pleading. Likewise, a party who takes inconsistent pleas and tries to establish both of them by contradictory oral evidence, places himself in peril as the evidence adduced in support of both the pleas would be conflicting, contradictory and mutually destructive and may hardly inspire confidence.

Moreover, all the inconsistent pleas sought to be raised by a party must be maintainable at law. Thus, a plaintiff cannot pray for a declaration that a particular contract is void and in the alternative for the specific performance of the same contract since it is not permissible under Section 37 of the Specific Relief Act, 1877.<sup>73</sup> Moreover, such inconsistent pleas are subject to Rule 16 of Order 6 which empowers the court to strike out any matter either in the plaint or in the written statement which may embarrass fair trial of the suit.

Finally, where a party has taken up a definite stand once and the court has given a decision on that footing, he cannot be subsequently allowed to take an inconsistent position with regard to the same matter.<sup>74</sup> In other words, a party cannot play fast and loose<sup>75</sup>, blow hot and cold<sup>76</sup>, or approbate and reprobate<sup>77</sup>, to the detriment of the other side.

72. *Firm Srinivas Ram Kumar v. Mahabir Prasad*, AIR 1951 SC 177; *Arundhati Mishra v. Ram Charitra Pandey*, (1994) 2 SCC 29.

73. *Prem Raj v. D.L.F. Housing and Construction Ltd.*, AIR 1968 SC 1355 at pp. 1356-57; (1968) 3 SCR 648.

74. *Supdt. of Taxes v. Bormahajan Tea Co. Ltd.* (1978) 1 SCC 513 at pp. 518-19; AIR 1978 SC 533 at p. 536; *G. Sarana (Dr.) v. University of Lucknow*, (1976) 3 SCC 585 at p. 591; AIR 1976 SC 2428 at p. 2433.

75. *Mamleshwar Prasad v. Kanhaiya Lal*, (1975) 2 SCC 232 at p. 235; AIR 1975 SC 907 at p. 909.

76. *Prasun Roy v. Calcutta Municipal Development Authority*, (1987) 4 SCC 217 at p. 221; AIR 1988 SC 205 at p. 207; *Iftikhar Ahmed v. Syed Mcharban Ali*, (1974) 2 SCC 151 at p. 155; AIR 1974 SC 749 at p. 751.

77. *Nagubai Ammal v. B. Shania Rao*, AIR 1956 SC 593 at pp. 601-02; 1256 SCR 451; *Michael Goldetz v. Serajuddin & Co.*, AIR 1963 SC 1044 at p. 1046; (1964) 1 SCR 9; *Swaran Lata v. Union of India*, (1979) 3 SCC 165 at p. 188; *Bar Council of Delhi v. Surjeet Singh*, (1980) 4 SCC 211; AIR 1980 SC 1612 at p. 1618; *R C Chandok v. Chuni Lal*, (1970) 3 SCC

Scrutton, L.J. rightly stated:<sup>78</sup>

"It startles me to hear it argued that a person can say the judgment is wrong and at the same time accept payment under the judgment as being right."

His Lordship added:

"[I]n my opinion, you cannot take the benefit of a judgment as being good and then appeal against it as being bad."<sup>79</sup>

Thus, a party proceeding on the basis of a rule as valid, cannot, during the arguments, challenge the validity thereof.<sup>80</sup> Similarly, a party claiming right of ownership of property in the previous litigation cannot claim right of easement in a subsequent suit.<sup>81</sup>

In *P.R. Deshpande v. Maruti Balaram*<sup>82</sup>, however, it was held by the Supreme Court that the principle would not apply to a tenant giving an undertaking to vacate the premises and not filing an appeal in a superior court. "By directing the party to give such an undertaking no court can scuttle or foreclose a statutory remedy of appeal or revision, much less a constitutional remedy."<sup>83</sup>

## 10. CONSTRUCTION OF PLEADINGS<sup>84</sup>

It has been uniformly held that pleadings in India should not be construed very strictly. They have to be interpreted liberally and regard must be had to the substance of the matter than the form thereof.<sup>85</sup> They

140: AIR 1971 SC 1238 at p. 1243; *R.N. Gosain v. Yashpal Dhir*, (1992) 4 SCC 683 AIR 1993 SC 352; *P.R. Deshpande v. Maruti Balaram*, (1998) 6 SCC 507. *Devasahayam v P Savithramma*, (2005) 7 SCC 653.

78. *Dexters Ltd. v. Hill Crest Oil Co.*, (1926) 1 KB 348. (1925) All ER Rep 273; 95 LJ KB 386(CA).

79. *Ibid*, see also *R.C. Chandiok v. Chuni Lal*, (1970) 3 SCC 140; *R.N. Gosain v. Yashpal Dhir*, (1992) 4 SCC 683; see the following observations. "He who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it"

80. *Madhusudhan v. Radharani*, AIR 1971 Cal 534, *I.L. Honnegouda v. State of Karnataka*, AIR 1978 SC 28; *Bapatia Venkata v. Sikhara Ramakrishna*, AIR 1958 AP 322.

81. *Dhirajlal v. Sankleshwar*, AIR 1976 Guj 180 (1976) 17 Guj LR 67; *Yogendra Kumar v. Union of India*, AIR 1972 Del 234, *Sultan v. Ganesh*, (1988) 1 SCC 664 AIR 1988 SC 716. (1998) 6 SCC 507 AIR 1998 SC 2079

82. *Ibid*, at p. 512 (SCC). at p. 2982 (AIR), see also *Evans v. Bartlam*, (1937) 2 All ER 646 1937 AC 473; 106 LJ KB 568

84. See also *supra*, "Interpretation", Pt I, Chap 1, *Mogha, supra*, at p. 7

85. *Harish Chandra v. Triloki Singh*, AIR 1957 SC 444 at p. 456 1957 SCR 370, *Katikara Chintamani Dora v. Guntreddi Annamannaidu*, (1974) 1 SCC 567 at p. 583-84 AIR 1974 SC 1069 at p. 1080; *Udhav Singh v. Madhav Rao Scindia*, (1977) 1 SCC 511 AIR 1976 SC 744 at p. 750. *Madan Gopal v. Mamraj Maniram*, (1977) 1 SCC 669 at p. 674 AIR 1976 SC 461 at p. 470. *Suraj Prakash v. Raj Rani*, (1981) 3 SCC 652 at p. 655 AIR 1981 SC 485 at p. 487, *Haridas Aildas Thadani v. Godrej Rustom Kermani*, (1984) 1 SCC 668

have to be interpreted not with formalistic rigour but with latitude or awareness of low legal literacy of poor people.<sup>86</sup> Again, pleadings have to be read as a whole and it is not permissible to cull out a passage and to read it out of context, in isolation. The intention of the party is to be gathered, primarily, from the tenor and terms of his pleadings as a whole.<sup>87</sup>

In *Madan Gopal v. Mamraj Maniram*<sup>88</sup>, the Supreme Court has rightly observed, "It is well-settled that pleadings are loosely drafted in courts and the courts should not scrutinise the pleadings with such meticulous care so as to result in genuine claims being defeated on trivial grounds."<sup>89</sup> (emphasis supplied)

Pleadings are not statutes and legalism is not verbalism. Common sense should not be kept in the cold storage when pleadings are construed. Parties win or lose on substantial questions, not "technical tortures" and courts cannot be "abettors".<sup>90</sup>

In *Ram Sarup v. Bishnu Narain Inter College*<sup>91</sup>, it was stated:

"It is well-settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should settle the essential material facts so that the other party may not be taken by surprise. The pleadings, however, should receive a liberal construction; no pedantic approach should be adopted to defeat justice on hair-splitting technicalities. *It is not desirable to place undue emphasis on form, instead the substance of the pleading should be considered.*"<sup>92</sup> (emphasis supplied)

The reason is obvious. As stated above<sup>93</sup>, the rules of procedure are intended as aids for a fair trial and for reaching a just decision. Their function is to facilitate justice and further its ends and not to obstruct

AIR 1983 SC 319, *Ram Sarup v. Bishnu Naram Inter College*, (1987) 2 SCC 555. AIR 1987 SC 1242.

86. *Ibid.* See also *Manjushri Raha v. B L Gupta*, (1977) 2 SCC 174 at p. 178. AIR 1977 SC 1158 at p. 1161; *K C Kapoor v. Radhika Devi*, (1981) 4 SCC 487 at p. 499. AIR 1981 SC 2118.

87. *Udhav Singh v. Madhav Rao Scindia*, (1977) 1 SCC 511, *Indian Oil Corpn v Municipal Corpn. Jullundhar*, (1993) 1 SCC 333. AIR 1993 SC 844, *Virendra Kashinath v. Vinayak N. Joshi*, (1999) 1 SCC 47. AIR 1999 SC 162.

88. (1977) 1 SCC 669. AIR 1976 SC 461.

89. *Ibid.* at p. 674 (SCC) at p. 470 (AIR), *Virendra Kashinath v. Vinayak N. Joshi*, (1999) 1 SCC 47. AIR 1999 SC 162.

90. *S.B. Noronah v. Prem Kumari*, (1980) 1 SCC 52 at p. 54. AIR 1980 SC 193 at p. 195, *Syed Dastagir v. T.R. Gopalakrishna Setty*, (1999) 6 SCC 337. AIR 1999 SC 3029.

91. (1987) 2 SCC 555. AIR 1987 SC 1242.

92. *Ibid.* at pp. 562-63 (SCC) at pp. 1246-47 (AIR).

93. See *supra*, "Interpretation", Pt. I, Chap. 1

it. A procedural law is not a tyrant but a servant, not an obstruction but an aid to justice, not a mistress but a handmaid to the administration of justice.<sup>94</sup> Provisions relating to pleadings in civil cases are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent deviations from the course which litigation on particular causes of action must take.

It is respectfully submitted that the following well-known and oft-quoted observations of Vivian Bose, J. in the leading case of *Sangram Singh v. Election Tribunal*<sup>95</sup> must be borne in mind while interpreting procedural laws:

"... [A] code of procedure must be regarded as such. It is 'procedure', something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people. *Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to 'both' sides) lest the very means designed for furtherance of justice be used to frustrate it.*"<sup>96</sup> (emphasis supplied)

Thus, it has been held that the court will not dismiss the suit of the plaintiff only on the ground that the claim is wrongly described, or a wrong section is quoted, or that proper relief is not claimed.

This does not, however, mean that the rules of pleadings are altogether ignored. The liberal construction must be confined within reasonable limits. Therefore, where the plaintiff is a practising lawyer and is also represented by a lawyer, or where a technical defence is set up against a just claim, or where in an election petition charges of corrupt practice have been levelled against the successful candidate, the pleadings must be strictly construed.

## 11. SIGNING AND VERIFICATION OF PLEADINGS: RULES 14-15

As a general rule, every pleading must be signed by the party or by one of the parties or by his pleader. But if the party is unable to sign the pleading, it can be signed by any person authorised by him.<sup>97</sup> Similarly, every pleading must be verified by the party or by one of the parties pleading or by some other person acquainted with the facts of the case. The person verifying the pleading must specify what paragraphs he verifies upon his knowledge and what paragraphs he verifies upon information received by him and believed by him to be true. The verifi-

94 *Suraj Prakash v. Raj Ram* (1961) 3 SCC 652 at p. 655; AIR 1961 SC 485 at p. 486.

95 AIR 1955 SC 425 (1955) 2 SC R 1.

96 *Id.* at p. 429 (AIR) at p. 8 (SC R).

97 R 14.

cation must be signed on an affidavit by the person verifying and must contain the date on which and the place at which it was signed. The person verifying the pleading should also furnish an affidavit in support of his pleadings.<sup>98</sup>

The object underlying this provision is to fix upon the party verifying or on whose behalf verification is made the responsibility for the statement that it contains, and to prevent as far as possible disputes as to whether the suit was instituted or defended with the knowledge or authority of the party, who has signed the verification or on whose behalf it has been signed.<sup>99</sup> Rule 14-A as added by the Amendment Act of 1976 requires a party to the suit to supply the address for service of notice. It further provides for the stay of suit of the plaintiff or striking off defence of the defendant in case the address supplied by him is found to be incomplete, false or fictitious.

A defect in the matter of signing and verification of pleadings is merely an irregularity and can be corrected at a later stage of the suit with the leave of the court and a suit cannot be dismissed nor an order be passed against a party on the ground of defect or irregularity in signing or verification of plaint or written statement.<sup>100</sup> Similarly, if the affidavit filed by the party is defective, a court, instead of rejecting it, may give an opportunity to the party to file a proper affidavit.<sup>101</sup>

## 12. STRIKING OUT PLEADINGS: RULE 16

The court is empowered to strike out any pleading if it is unnecessary, scandalous, frivolous or vexatious, or tends to prejudice, embarrass or delay the fair trial of the suit or is otherwise an abuse of the process of the court.<sup>102</sup>

In *Sathi Vijay Kumar v. Tota Singh*<sup>103</sup>, the Supreme Court observed that bare reading of Rule 16 of Order 6 of the Code makes it clear that a court may order striking of pleadings in the following cases:

- (i) where such pleading is unnecessary, scandalous, frivolous or vexatious; or
- (ii) where such pleading tends to prejudice, embarrass or delay fair trial of the suit; or

98. R 15.

99. *A K K Nambiar v. Union of India*, (1969) 3 SCC 864 at p. 867. AIR 1970 SC 652 at pp 653-54.

100. *Bhikaji v. Brijlal*, AIR 1955 SC 610. (1955) 2 SCR 428, *Purushottam Umedbhai & Co v. Manilal & Sons*, AIR 1961 SC 325; (1961) 1 SCR 982.

101. *Dwarka Nath v. ITO*, AIR 1966 SC 81 at p. 88 (1965) 3 SCR 536.

102. R 16, see also *Mohan Rawale v. Damodar Tatyaba*, (1994) 2 SCC 392 at p. 399.

103. (2006) 13 SCC 353 at p. 365, see also, *Abdul Razak v. Mangesh Rajaram Wagle*, (2010) 2 SCC 432.

- (iii) where such pleading is otherwise an abuse of the process of the court.

Generally, a court does not advise parties as to how they should draft their pleadings. But this is subject to the rider that the parties do not offend the rules of pleadings by making averments or introducing pleas which are unnecessary, which may tend to prejudice, embarrass or delay fair trial. In such cases, the court will interfere. This power, however, must be exercised by the court sparingly.<sup>104</sup>

Recently, in *Sathi Vijay Kumar v. Tota Singh*<sup>105</sup>, considering English and Indian decisions on the point, the Supreme Court stated:

"(I)t cannot be overlooked that *normally*, a court cannot direct parties as to how they should prepare their pleadings. If the parties have not offended the rules of pleadings by making averments or raising arguable issues, the court would not order striking out pleadings. *The power to strike out pleadings is extraordinary in nature and must be exercised by the court sparingly and with extreme care, caution and circumspection.*" (emphasis supplied)

### 13. VARIANCE BETWEEN PLEADING AND PROOF

It is well-settled that a party can be permitted to adduce evidence on the basis of the case pleaded by him in his pleading and he cannot set up a case inconsistent with his pleading.<sup>106</sup> "No amount of proof can substitute pleadings which are the foundation of the claim of a litigating party."<sup>107</sup>

The purpose is twofold; (i) to appraise the opposite party, distinctly and specifically, of the case he is called upon to answer, so that he may properly prepare his defence and may not be taken by surprise; and (ii) to maintain an accurate record of the cause of action as a protection against a second or subsequent proceeding founded upon the same allegations.<sup>108</sup>

104. *Roop Lal v. Nachhattar Singh*, (1982) 3 SCC 487; AIR 1982 SC 1559, *K K Modi v K N Modi*, (1998) 3 SCC 573; AIR 1998 SC 1297, *United Bank of India v Naresh Kumar*, (1996) 6 SCC 660; AIR 1997 SC 3

105. (2006) 13 SCC 353 at p. 366 (*per* C.K. Thakker J); see also, *Abdul Razak v. Mangesh*, (2010) 2 SCC 436

106. *Om Prabha v. Abnash Chand*, AIR 1968 SC 1083, *Harihar Prasad Singh v Balmiki Prasad Singh*, (1975) 1 SCC 212; AIR 1975 SC 733; (1975) 2 SCR 932, *Vinod Kumar v Surjit Kaur*, (1987) 3 SCC 711; AIR 1987 SC 2179, *Om Prakash v Ram Kumar*, (1991) 1 SCC 441; AIR 1991 SC 409

107. *Abubakar Abdul Inamdar v Harun Abdul Inamdar*, (1995) 5 SCC 612; AIR 1996 SC 112, *Siddik Mahd Shah v Saran*, AIR 1930 PC 57; 121 IC 204, *Bondar Singh v Nihal Singh*, (2003) 4 SCC 161, *Bachhaaj Nahar v Nilima Mandai*, (2008) 17 SCC 491; AIR 2009 SC 1103

108. *Siddik Mahd Shah v Saran*, AIR 1930 PC 57; *Om Prabha v Abnash Chand*, AIR 1968 SC 1083, *Lala Karam Chand v Firm Mian Mir Ahmad Aziz Ahmad*, AIR 1938 PC 121; 173 IC 736

The fundamental rule of pleading is that a party can only succeed on the basis of what he has pleaded and proved. He cannot succeed on a case not set up by him. He also cannot be permitted to change his case at the stage of trial if it is inconsistent with his pleadings. Such variation would cause surprise and confusion and is always looked upon by courts with considerable disfavour and suspicion.<sup>109</sup>

It will also introduce a great amount of uncertainty into judicial proceedings, if final determination of causes is founded upon inferences, at variance with the pleadings of the parties.<sup>110</sup>

Each and every variance between the pleading and the proof, however, is not necessarily fatal. Where there is foundation in the pleading, or no prejudice to the other side, a party should not be denied just relief.<sup>111</sup>

Whether or not a particular plea has been raised must be decided by reading the pleading as a whole keeping in mind the substance rather than the form of pleadings. Where parties are aware of the controversy and go to trial with full knowledge that a particular question is at issue, absence of specific pleading is a mere irregularity.<sup>112</sup> Finally, a pure question of law or of jurisdiction can be raised at any stage.<sup>113</sup>

#### 14. OBJECTION TO PLEADING

An objection to pleading should be taken at the earliest. If at an appropriate stage such objection is not raised, it is deemed to have been waived. This is based on the principle that, in such cases, it cannot be held that prejudice has been caused to the party raising a plea at the belated stage.<sup>114</sup>

#### 15. AMENDMENT OF PLEADINGS: RULES 17-18

##### (a) General

As already stated, material facts and necessary particulars must be stated in the pleadings and the decision cannot be based on the

109. *Narendra v. Abhoy*, AIR 1934 Cal 54 (FB), *Nagubai Ammal v. B. Sham Rao*, AIR 1956 SC 593; 1956 SCR 451.

110. *Eshanchunder Sing v. Samachurn Bhutto*, (1886) 11 MIA 7, 6 Suth WR 57 (PC); *Trojan & Co. v. RM N N Nagappa Chettiar*, AIR 1953 SC 235, 1953 SCR 789; *Nagubai Ammal v. B. Shama Rao*, AIR 1956 SC 593; 1956 SCR 451.

111. *Babu Raja Mohan v. Babu Manzoor Ahmad*, (1942-43) 70 IA 1; AIR 1943 PC 29; *Union of India v. Khas Karanpura Colliery Co. Ltd.*, AIR 1969 SC 125 (1968) 3 SCR 784.

112. *Firm Srinivas Ram Kumar v. Mahabir Prasad*, AIR 1951 SC 177, 1951 SCR 277, *K. C. Kapoor v. Radhika Devi*, (1981) 4 SCC 487, AIR 1981 SC 2118.

113. *State of Rajasthan v. Rao Raja Kalyan Singh*, (1972) 4 SCC 165, AIR 1971 SC 2018.

114. *Nagubai Ammal v. B. Shama Rao*, AIR 1956 SC 593, 1956 SCR 451, *Kunju Kesavan v. M.M. Philip*, AIR 1964 SC 164 (1964) 3 SCR 634, *K.C. Kapoor v. Radhika Devi*, (1981) 4 SCC 487; AIR 1981 SC 2118.

grounds outside the pleadings. But many a times the party may find it necessary to amend his pleadings before or during the trial of the case. "Fresh information has come to hand, interrogatories have been fully answered by his opponent; documents whose existence was unknown to him have been disclosed which necessitates reshaping his claim or defence. Or his opponent may have raised some well-founded objections to his pleadings, in which case it will be advisable for him to amend at once his pleadings before it is too late."<sup>115</sup>

### (b) Rule 17

Rule 17 provides for amendment of pleadings. It reads as under:

"The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

### (c) Object

The object of the Rule is that the courts should try the merits of the cases that come before them and should consequently allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.<sup>116</sup> Ultimately, courts exist for the purpose of doing justice between the parties and not for punishing them, and they are empowered to grant amendments of pleadings in the larger interest of doing full and complete justice to the parties.<sup>117</sup> Provisions for the amendment of pleadings are intended for promoting the ends of justice and not for defeating them.<sup>118</sup>

The Privy Council<sup>119</sup> has rightly observed, "All rules of courts are nothing but provisions intended to secure the proper administration of justice and it is, therefore, essential that they should be made to serve

115 Bullen, Leake and Jacob, *Precedent and Pleadings* (1959) at p. 61. See also *supra*, *Mogha* at pp. 126-69.

116 *Pirgonda Patil v. Katgonda Patil*, AIR 1957 SC 363, 1957 SCR 559.

117 *Jai Jai Ram Manohar Lal v. National Building Material Supply*, (1969) 1 SCC 869, AIR 1969 SC 1267.

118 *Ganesh Trading Co. v. Moh. Ram* (1978) 2 SCC 91, AIR 1978 SC 484; *Ravesh Kumar v. K.K. Modi*, (2006) 4 SC C 385, AIR 2006 SC 1647; *State of A.P. v. Pioneer Builders* (2006) 12 SC C 119, AIR 2007 SC 173.

119 *Ma Shwe Mya v. Maung Ma Hnong* (1920-21) 48 IA 214, AIR 1922 PC 249.

and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject-matter of the suit."<sup>120</sup>

In the leading case of *Cropper v. Smith*<sup>121</sup>, the object underlying amendment of pleadings has been laid down by Bowen, L.J. in the following words:

"I think it is a well-established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace ... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as *anything else in the case is a matter of right*."<sup>122</sup>

(emphasis supplied)

#### (d) Discretion of court

Rule 17 of Order 6 confers wide discretion on a court to allow either party to alter or amend his pleading at any stage of the proceedings on such terms as it deems fit. Such discretion, however, must be exercised judicially and in consonance with well-established principles of law.<sup>123</sup> The proviso as inserted by the Amendment Act, 2002, however, puts further restrictions on the power of the court in allowing amendment.<sup>124</sup>

#### (e) Applicability to other proceedings

Over and above civil suits, the provisions of Rule 17 apply to several other proceedings such as execution proceedings, insolvency proceedings, arbitration proceedings, election matters, proceedings under the Land Acquisition Act, claim petitions etc. Even where the provisions of the Code are not applicable, courts and tribunals are competent to

120. *Ibid*, at pp. 250-51 (AIR) 216-17 (IA); see also *Suraj Prakash v. Raj Rani*, (1981) 3 SCC 652 at p. 655; AIR 1981 SC 485 at p. 487.

121. (1884) 29 Ch D 700

122. *Ibid*, at pp 710-11.

123. For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn) Vol. III at pp. 444-45

124. For detailed discussion, see *infra*, "Amendment after commencement of trial: Proviso".

devise their own procedure consistent with and based on the general principles of justice, equity and good conscience.<sup>125</sup>

#### (f) Rule 17: Whether exhaustive

The provisions of Rule 17 of Order 6 are not exhaustive of the power of a court in a matter of amendment of pleadings. The power of amendment is inherent in the court and where Rule 17 does not apply, resort can be had to Section 151 of the Code.<sup>126</sup>

#### (g) Leave to amend when granted

The rule confers a very wide discretion on courts in the matter of amendment of pleadings. As a general rule, leave to amend will be granted so as to enable the real question in issue between the parties to be raised in pleadings, where the amendment will occasion no injury to the opposite party and can be sufficiently compensated for by costs or other terms to be imposed by the order.<sup>127</sup>

It is submitted that the following observations of Batchelor, J. in the case of *Kisandas v. Rachappa Vithoba*<sup>128</sup>, lay down correct law:

"All amendments ought to be allowed which satisfy the two conditions (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties."<sup>129</sup>

Therefore, the main points to be considered before a party is allowed to amend his pleading are: *firstly*, whether the amendment is necessary

125. For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. III at pp. 445-46

126. For detailed discussion, see *infra*, "Inherent powers of courts", Pt V, Chap 4

127. *Tildesley v. Harper*, (1878) 10 Ch D 393 (1874-80) All ER Rep Ext 1612 (CA), *Jai Jai Ram Manohar Lal v. National Building Material Supply*, (1969) 1 SCC 869 at p. 871 (SCC) AIR 1969 SC 1267 at p. 1269 (AIR), *Harcharan v. State of Haryana*, (1982) 3 SCC 408 at pp. 411-12: AIR 1983 SC 43 at p. 45, *Nair Service Society Ltd v K C Alexander*, AIR 1968 SC 1165 at p. 1178: (1968) 3 SCR 163, *Deena v Union of India*, (1983) 4 SCC 645: AIR 1983 SC 1155, *CST v. Auraiya Chamber of Commerce*, (1986) 3 SCC 50: AIR 1986 SC 1556, *Chinnammal v. P Arumugham*, (1990) 1 SCC 513: AIR 1990 SC 1828, *Ganesh Trading Co v Moji Ram*, (1978) 2 SCC 91: AIR 1978 SC 484, *N T Veluswami v G. Raja Nair*, AIR 1959 SC 422: 1959 Supp (1) SCR 623, *B K. Narayana v Parameswaran*, (2000) 1 SCC 712, *Usha Balashaheb v Kiran Appaso*, (2007) 5 SCC 602: AIR 2007 SC 1663.

128. ILR (1909) 33 Bom 644: 4 IC 726 (1909) 11 Bom LR 1042

129. *Ibid*, at p. 655 (ILR). See also *Pirgonda Patil v Kalgonda Patil*, AIR 1957 SC 363 at p. 366: 1957 SCR 559, *L J Leach & Co Ltd v Jordon Skinner & Co*, AIR 1957 SC 357: 1957 SCR 438, *Surai Prakash v Raj Rani*, (1981) 3 SCC 652 at p. 655: AIR 1981 SC 485 at p. 487, *B K Narayana v Parameswaran*, (2000) 1 SCC 712, *Usha Balashaheb v Kiran Appaso*, (2007) 5 SCC 602: AIR 2007 SC 1663.

for the determination of the real question in controversy; and *secondly*, can the amendment be allowed without injustice to the other side.

The first condition which must be satisfied before the amendment can be allowed by the court is whether such amendment is necessary for the determination of the real question in controversy. If that condition is not satisfied, the amendment should not be allowed. On the other hand, if the amendment is necessary to decide the "real controversy" between the parties, the amendment should be allowed even though the court may think that the party seeking the amendment will not be able to prove the amended plea. This is the basic test which governs the courts' unchartered powers of amendment of pleadings. No amendment should be allowed *when it does not satisfy this cardinal test*.<sup>130</sup> (emphasis supplied)

Thus, it has been held that where the amendment is sought to avoid multiplicity of suits,<sup>131</sup> or where the parties in the plaint are wrongly described,<sup>132</sup> or where some properties are omitted from the plaint by inadvertence,<sup>133</sup> or where there is a mistake in the statement of the cause of action,<sup>134</sup> or a *bona fide* omission in making the necessary averments in the plaint,<sup>135</sup> or a suit is brought under a wrong Act,<sup>136</sup> the amendment should be allowed.

The second condition is also equally important, according to which no amendment will be allowed which will cause injustice to the opposite party. It is settled law that the amendment can be allowed if it can be made without injustice to the other side.<sup>137</sup> But it is also a cardinal rule that "there is no injustice if the other side can be compensated by costs".<sup>138</sup>

130. *Per* P.B. Mukharji, J. in *Nrising Prasad v. Steel Products Ltd*, AIR 1953 Cal 15 at p. 17: 89 Cal LJ 140.

131. *L.J. Leach & Co. Ltd. v. Jaidine Skinner & Co.*, AIR 1957 SC 357: 1957 SCR 438.

132. *Jai Jai Ram Manohar Lal v. National Building Material Supply*, (1969) 1 SCC 869: AIR 1969 SC 1267.

133. *Someshwari Prasad v. Maheshwari Prasad*, (1935-36) 63 IA 441: AIR 1936 PC 332.

134. For detailed discussion, see *supra*, Chap V.

135. *S. Rm Ar. S. Sp Sathappa Chettiar v S Rm Ar. Rm. Ramanathan Chettiar*, AIR 1958 SC 245: 1958 SCR 1024; *Nanduri Yogananda Lakshminarasimhachari v. Agastheswaraswamivarur*, AIR 1960 SC 622 at p. 624: (1960) 2 SCR 768.

136. *Jai Jai Ram Manohar Lal v. National Building Material*, (1969) 1 SCC 869; *A.K. Gupta and Sons Ltd. v. Damodar Valley Corpn.*, AIR 1967 SC 96: (1966) 1 SCR 796.

137. *Jai Jai Ram Manohar Lal v. National Building Material*, (1969) 1 SCC 869: AIR 1969 SC 1267; *Haridas v. Varadaraja Pillai*, (1971) 2 SCC 601: AIR 1971 SC 2366 at p. 2369; *Ganesh Trading Co. v. Moji Ram*, (1978) 2 SCC 91 at p. 871 (SCC).

138. *Clarapade & Co. v. Commercial Union Assn.*, (1883) 32 WR 262 at p. 263; *Weldon v Neal*, (1887) 19 QB 394 (CA) at p. 396; *Haridas v. Varadaraja Pillai*, (1971) 2 SCC 601. AIR 1971 SC 2366; *Ganesh Trading Co. v. Moji Ram*, (1978) 1 SCC 91, *B.K. Narayana v Parameswaran*, (2000) 1 SCC 712.

Bowen, L.J.<sup>139</sup> rightly states, "I have found in my experience that there is one panacea which heals every sore in litigation, and that is costs." Bramwell, L.J.<sup>140</sup> also observed, "I have had much to do in Chambers with applications for leave to amend, and I may perhaps be allowed to say that this humble branch of learning is very familiar to me. My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise."<sup>141</sup>

Thus, the court may allow amendment for the purpose of granting consequential relief;<sup>142</sup> or granting relief on the basis of different approaches to the same facts;<sup>143</sup> or to avoid multiplicity of proceedings;<sup>144</sup> or to take notice of subsequent events;<sup>145</sup> or where the amendment is of a formal nature;<sup>146</sup> or to clarify the pleadings;<sup>147</sup> or to allow misdescription of parties to be corrected,<sup>148</sup> etc.

#### (h) Leave to amend when refused

It is true that courts have very wide discretion in the matter of amendment of pleadings. But the wider the discretion, the greater is the

139. *Cropper v. Smith*, (1884) 26 Ch D 700. See also *Suraj Prakash v. Raj Rani*, (1981) 3 SCC 652; AIR 1981 SC 485.

140. *Tildesley v. Harper*, (1878) 10 Ch D 393, at pp. 396-97.

141. The following warning, however, should not be ignored "The courts do not exist for so commercial a purpose as to be mere institutions for dispensing costs without deciding the merits. They exist primarily for the justice of determining the genuine and real disputes between the parties and incidentally for awarding costs." Per PB Mukharji, J. in *Nrising Prasad v. Steel Products Ltd.*, AIR 1953 Cal 15.

142. *Nanduri Yogananda Lakshminarasimhachari v. Agastheswaraswamivaru*, AIR 1960 SC 622 at p. 624; (1960) 2 SCR 768; *L J Leach & Co Ltd v. Jaidine Skinner & Co.*, AIR 1957 SC 357; *Bikram Singh v. Ram Baboo*, (1982) 1 SCC 485. AIR 1981 SC 2036.

143. *A.K. Gupta and Sons Ltd. v. Damodar Valley Corpn.*, AIR 1967 SC 96 (1966) 1 SCR 796; *Jagdish Singh v. Natthu Singh*, (1992) 1 SCC 647. AIR 1992 SC 1604.

144. *L.J. Leach & Co. Ltd v. Jaidine Skinner & Co.*, AIR 1957 SC 357. 1957 SCR 438; *Nichhalbhai v. Jaswantlal*, AIR 1966 SC 997 at pp. 999-1000; *Shukharchand Jain v. Digamber Jain Praband Karim Sabha*, (1974) 1 SCC 675; *Nair Service Society Ltd v. K C Alexander*, AIR 1968 SC 1165 at p. 1178 (1968) 3 SCR 163; *Suraj Prakash v. Raj Rani*, (1981) 3 SCC 652 at p. 655. AIR 1981 SC 485 at p. 486.

145. See *infra*, Chap. 7. See also *Shukharchand Jain v. Digamber Jain Praband Karim Sabha*, (1974) 1 SCC 675. AIR 1974 SC 1178; *Hasmat Rai v. Raghunath Prasad*, (1981) 3 SCC 103. AIR 1981 SC 1711; *Hircharan v. State of Hariana*, (1982) 3 SCC 408 at pp. 411-12. AIR 1983 SC 43 at p. 45; *Vineet Kumar v. Mangal Sam*, (1984) 3 SCC 352 at pp. 350-61. AIR 1985 SC 817.

146. *Gopal Krishnaji Ketkar v. Mohd. Jaffer*. AIR 1954 SC 5 at p. 89.

147. *Purushottam Umedbhai & Co. v. Manilal & Sons*, AIR 1961 SC 325 (1961) 1 SCR 982; *Laxmidas v. Nanabhai*, AIR 1964 SC 11 at p. 18. (1964) 2 SCR 567.

148. *Ibid.*, see also *Kurupati Venkata v. Thendipati Ramaswami & Co.*, AIR 1964 SC 818 at p. 823. 1963 Supp. (2) SCR 995; *Jai Jai Ram Manohar Lal v. National Building Material Supply*, (1969) 1 SCC 869. AIR 1969 SC 2267.

possibility of its abuse. Ultimately, it is a legal power and no legal power can be exercised improperly, unreasonably or arbitrarily.

In *Ganga Bai v. Vijay Kumar*<sup>149</sup>, the Supreme Court has rightly observed:

"The power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice, the law of limitation notwithstanding. But the exercise of such far-reaching discretionary powers is governed by judicial considerations, and *wider the discretion, greater ought to be the care and circumspection on the part of the court.*"<sup>150</sup>

(emphasis supplied)

Generally, in the following cases, leave to amend will be refused by the court:

(1) Leave to amend will be refused where the amendment is not necessary for the purpose of determining the real question in controversy between the parties.<sup>151</sup> As discussed above,<sup>152</sup> the "*real controversy*" test is the basic test and it is the primary duty of the court to decide whether such amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed; if it is not, the amendment will be refused. Therefore, if the amendment is not necessary or is merely technical or useless or without any substance, it will be refused.<sup>153</sup>

The leading decision on the point is *Edevian v. Cohen*<sup>154</sup>. In that case, A's furniture was wrongfully removed by B and C. A sued B for damages and for judgments against B. A then sued C for damages for the same wrong. After A's evidence was over, C applied for amendment of written statement by pleading judgment against B as bar to suit against him. B and C being wrongdoers, the judgment against B precluded A from suing C for the same wrong. The application was rejected since it was not necessary to decide the real question in controversy between the parties but enabled C to avail for himself the benefit of the technical rule of law.

Thus, when the negligence was proved, the amendment to supply its particulars was refused, being unnecessary and useless since the real controversy had already been decided. Similarly, after the evidence of the plaintiff was over, an amendment application made by the defendant raising a purely technical objection to the plaintiff's right to sue was rejected. Likewise, if a landlord is not entitled to obtain possession of the rented property from the tenant on the ground of reasonable and

149. (1974) 2 SCC 393; AIR 1974 SC 1126

150. *Ibid*, at p. 399 (SCC) 1130 (AIR).

151. See *supra*, "Leave to amend when granted"

152. *Ibid*, see also *Kurapati Venkata v. Thondepu Ramaswami & Co.*, AIR 1964 SC 818 at p. 823; 1963 Supp (2) SCR 995, *Jai Jai Ram Manohar Lal v. National Building Material Supply*, (1969) 1 SCC 869 AIR 1969 SC 1267.

153. See also, Mulla, *Code of Civil Procedure* (2011) Vol. II at p. 1172.

154. (1889) 43 Ch D 187, (CA).

*bona fide* requirement if he has purchased the property after a particular date, an amendment to add that ground for obtaining possession can be refused by the court as being unnecessary if the landlord has purchased the property after that date.

(2) Leave to amend will be refused if it introduces a totally different, new and inconsistent case or changes the fundamental character of the suit or defence.<sup>155</sup>

In *Steward v. North Metropolitan Tramways Co.*<sup>156</sup>, the plaintiff filed a suit for damages against the tramway company for damages caused by the negligence of the company in allowing the tramway to be in defective condition. The company denied the allegation of negligence. It was not even contended that the company was not the proper party to be sued. More than six months after the written statement was filed, the company applied for leave to amend the defence by adding the plea that under the contract entered into between the company and the local authority the liability to maintain the roadway in proper condition was of the latter and, therefore, the company was not liable. At the date of the amendment application, the plaintiff's remedy against the local authority was time-barred. Had the agreement been pleaded earlier, the plaintiff could have filed a suit even against the local authority. Under the circumstances, the amendment was refused. Pollock, B. rightly observed, "The test as to whether the amendment should be allowed is, whether or not the defendants can amend without placing the plaintiff in such a position that he cannot be recouped, as it were, by any allowance of costs, or otherwise. *Here the action would be wholly displaced by the proposed amendment and I think it ought not to be allowed.*"<sup>157</sup>

(emphasis supplied)

Similarly, where the case of the plaintiff throughout was that the suit property was non-ancestral, an issue as to the character of property was framed, evidence led and the finding was recorded that the property was non-ancestral property; the application for the amendment of the plaint alleging that the property was ancestral cannot be allowed at the appellate stage as it sought to introduce a totally new and inconsistent case.

155 *Modi Spg. & Wvg. Mills Co. Ltd. v. Ladda Ram*, (1976) 4 SCC 320 at pp. 321-22 AIR 1977 SC 680 at p. 681, *Haji Mohd. Ishaq v. Mohd. Iqbal*, (1978) 2 SCC 493 at pp. 497-98 AIR 1978 SC 798 at pp. 800-01, *Suraj Prakash v. Raj Rani*, (1981) 3 SCC 652 at p. 655 AIR 1981 SC 485 at p. 487, *Jagan Nath v. Chander Bhan*, (1988) 3 SCC 57 AIR 1988 SC 1362, *A. K. Gupta and Sons Ltd. v. Damodar Valley Corpn.*, AIR 1967 SC 96 (1966) 1 SCR 796, *State of A.P. v. Pioneer Builders*, (2006) 12 SCC 119 AIR 2007 SC 113.

156 (1886) 16 QB 178 (CA).

157 *Ibid.* at p. 180. see also the following observations of Straight J. "We cannot countenance the notion that a plaintiff coming into court with one case and hopelessly failing to prove it, should be permitted to succeed upon another and that too directly in antagonism with his primary allegation."

The test as to whether the amendment should be allowed is (as stated by Pollock) whether or not the party can amend his pleading without placing the other side in such a position that he cannot be recouped, as it were, by any allowance of costs, or otherwise.

Whether or not the proposed amendment changes the character of the suit would depend on the facts and circumstances of each case considering the nature of the amendment sought.

(3) Leave to amend will be refused where the effect of the proposed amendment is to take away from the other side a legal right accrued in his favour.<sup>158</sup>

As a general rule, every amendment should be allowed if it can be made without prejudice or injustice to the other side, and one of the classes of cases wherein the amendment may work injustice to the opposite party is where it takes away from a party a right accrued to him by lapse of time. Therefore, in absence of special circumstances such an amendment should not be allowed by the court.

The English case on the subject is *Weldon v. Neal*<sup>159</sup>. In that case, A filed a suit against B for damages for slander. A thereafter applied for leave to amend the plaint by adding fresh claims in respect of assault and false imprisonment. At the date of the application, those claims were barred by limitation though they were within the period of limitation at the date of the suit. The amendment was refused since the effect of granting it would be to take away from B the legal right (the defence under the law of limitation) and thus would cause prejudice to him.

The rule, however, is not a universal one and under certain circumstances such an amendment may be allowed by the court notwithstanding the law of limitation.<sup>160</sup> The fact that the claim is barred by the law of limitation is but one of the factors to be taken into account by the court in exercising the discretion as to whether the amendment should

158. *Pirgonda Patil v. Kalgonda Patil*, AIR 1957 SC 363 at p. 365-66; 1957 SCR 559; *L J Leach & Co. Ltd. v. Jairdine Skinner & Co.*, AIR 1957 SC 357; 1957 SCR 438; *Laxmidas. Nanabhai*, AIR 1964 SC 11 at p. 18. (1964) 2 SCR 567, *A.K. Gupta and Sons Ltd. v. Damodar Valley Corpn.*, AIR 1967 SC 96 (1966) 1 SCR 796, *Ram Dayal v. Brijraj Singh*, (1969) 2 SCC 218 at p. 220; AIR 1970 SC 110 at p. 112, *Ganga Bai v. Vijay Kumar*, (1974) 2 SCC 393; AIR 1974 SC 1126, *Shanti Kumar v. Home Insurance Co. of New York*, (1974) 2 SCC 387 at p. 392; AIR 1974 SC 1719 at pp. 1722-23, *Ganesh Trading Co. v. Moji Ram*, (1978) 2 SCC 91; AIR 1978 SC 484; *Jagan Nath v. Chander Bhan*, (1988) 3 SCC 57. AIR 1988 SC 1362; *Patasibai v. Ratanlal*, (1990) 2 SCC 42; *Muni Lal v. Oriental Fire & General Insurance Co. Ltd.*, (1996) 1 SCC 90, *K. Raheja Constructions Ltd. v. Alliance Ministries*, 1995 Supp (3) SCC 17; AIR 1995 SC 1768, *Usha Balashaheb v. Kiran Appaso*, (2007) 5 SCC 602. AIR 2007 SC 1663, *Ramchandra v. Damodar Trimbak*, (2007) 6 SCC 737. AIR 2007 SC 2577.

159. (1887) 19 QB 394 (CA). See also *Steward v. North Metropolitan Tramways Co.*, (1886) 16 QB 178 (CA).

160. *Ganga Bai v. Vijay Kumar*, (1974) 2 SCC 393. AIR 1974 SC 1126, *Arundhati Mishra v. Ram Charitra Pandey*, (1994) 2 SCC 29

be allowed, but it does not affect the power of the court if the amendment is required in the interests of justice.<sup>161</sup>

It is submitted that the following observations of Lord Buckmaster in the case of *Charan Das v. Amir Khan*<sup>162</sup> lay down correct law, wherein the learned Law Lord observed:

"That there was full power to make the amendment cannot be disputed, and though such a power should not as a rule be exercised where the effect is to take away from a defendant a legal right which has accrued to him by lapse of time, yet *there are cases where such considerations are outweighed by the special circumstances of the case.*"<sup>163</sup> (emphasis supplied)

(4) Leave to amend will be refused where the application for amendment is not made in good faith.<sup>164</sup> As a general rule, leave to amend ought not to be granted if the applicant has acted *mala fide*<sup>165</sup> Want of *bona fides* may be inferred from the circumstances of the case. When there is no substantial ground for the case proposed to be set up by the amendment, or the object is to defeat or delay the plaintiff's claim, or merely to reagitate the same question and lead further evidence, the amendment was not granted as not being *bona fide*.<sup>166</sup>

Thus, when, in an earlier proceeding, a compromise decree was passed and had become final, in a subsequent suit, the plaintiff cannot be allowed to amend his plaint by permitting him to raise contentions that had not found favour with the court. Apart from being highly belated, it was an afterthought for averting the inevitable consequence

161 *Ibid*, at p. 180; see also, the following observations of Straight, J., "We cannot countenance the notion that a plaintiff coming into court with one case, and hopelessly failing to prove it, should be permitted to succeed upon another, and that too directly in antagonism with his primary allegation."

162. *Charan Das v. Amir Khan*, (1919-20) 47 IA 255 AIR 1921 PC 50

163. *Ibid*, at pp. 51-52 (AIR). See also *Ganga Bai v. Vijay Kumar*, (1974) 2 SCC 393, *Pirgonda Patil v. Kalgonda Patil*, AIR 1957 SC 363; *L J Leach & Co Ltd v. Jaidine Skinner & Co.*, AIR 1957 SC 357, *Shanti Kumar v. Home Insurance Co. of New York*, (1974) 2 SCC 387

164. *Pirgonda Patil v. Kalgonda Patil*, AIR 1957 SC 363 at p. 365 1957 SCR 559 *Jai Jai Ram Manohar Lal v. National Binding Material Supply*, (1969) 1 SCC 869 AIR 1969 SC 1267, *Tildesley v. Harper*, (1878) 10 Ch D 393 at p. 397, *Banta Singh v. Harbhavan Kaur* AIR 1974 Puri 247 (FB) See also *supra*, *Mogha*, at pp. 139-40

165 *Ganga Bai v. Vijay Kumar* (1974) 2 SCC 393 AIR 1974 SC 1126 *Arundhati Mishra v. Ram Chandra Pandey* (1994) 2 SCC 79

166 *Kanakarathanammal v. V S. Loganatha Mudahar* AIR 1965 SC 271 (1964) 6 SCR 1; *Raj Kumar v. Raj Kumar Pasupathinath* (1969) 2 SCC 258 at p. 262 AIR 1970 SC 42 at p. 45, *Gouri Shanker v. Hindustan Trust (P) Ltd.*, (1973) 2 SCC 127 at p. 132 AIR 1972 SC 2091 at p. 2095 *Ganga Bai v. Vijay Kumar* (1974) 2 SCC 393 AIR 1974 SC 1126 *Pandit Ishwardas v. State of M P.*, (1979) 4 SCC 163 AIR 1979 SC 551 (1979) 2 SCR 424 *D. I. F. United (P) Ltd. v. Prem Raj* (1981) 1 SCC 433 at pp. 434-35 AIR 1981 SC 805 at p. 806, *S. Kumar v. Institute of Constitutional & Parliamentary Studies* (1983) 4 SCC 516 at p. 518 AIR 1984 SC 59 at p. 61 *Saroj Rani v. Sudarshan Kumar Chadha* (1984) 4 SCC 90 at pp. 97-98 AIR 1984 SC 1562 at pp. 1565-66

of earlier litigation. Such amendment, therefore, cannot be said to be *bona fide*.<sup>167</sup>

### (i) Subsequent events

As a general rule, every litigation must be determined on the basis of facts existed on the date of filing of the suit. A court may, however, take into account subsequent events in order to shorten litigation or to preserve, protect and safeguard rights of both the parties and to subserve the ends of justice. For that purpose, a court may allow amendment in pleading of the parties.<sup>168</sup>

### (j) Merits not to be considered

While considering whether an application for amendment should or should not be allowed, the court should not go into correctness or falsity of the case in the amendment "The merits of the amendment sought to be incorporated by way of amendment are not to be judged at the stage of allowing prayer for amendment."<sup>169</sup>

### (k) Who may apply?

Normally, it is the plaintiff or the defendant who may apply for amendment of his pleading i.e. plaint or written statement.

Where there are two or more plaintiffs or defendants in a suit, one or more plaintiffs or defendants may make such application.

### (l) Who may grant amendment?

Ordinarily, it is the trial court which can grant an application for amendment of plaint or written statement. But an appellate or revisional court can also grant such application for amendment of pleading. Even the Supreme Court may grant an application for amendment of plaint or written statement in an appropriate case.<sup>170</sup>

### (m) Notice to opposite party

When an application for amendment is made by a party to a suit, an opportunity should be given to the other side to file an objection against

167 *Patasibai v. Ratanlal*, (1990) 2 SCC 42.

168 For detailed discussion, see *infra*, Chap. 7.

169. *Sampath Kumar v. Ayyakannu*, (2002) 7 SCC 559; *T.K. Sreedharan v. P.S. Job*, AIR 1969 Ker 75, *Mangal Dass v. Union of India*, AIR 1973 Del 96, *Usha Devi v. Rizevan Ahmad*, (2008) 3 SCC 717.

170. For detailed discussion, see *infra*, "At any stage of proceedings"

such prayer. An order granting amendment without hearing the opposite party is not legal and valid.

But, if the amendment is purely formal or technical in nature, non-issuance of notice is not material.

Where the plaint is amended, notice of amended plaint must be served on the defendant.

### (n) Recording of reasons

While deciding an application for amendment of pleading, the court must apply its mind and should record reasons for allowing or not allowing the amendment.

### (o) Principles

Provisions relating to amendment of pleadings must be liberally construed with a view to promote the ends of justice and not to defeat them. The purpose and object of rules of pleadings is to decide the real controversy between the parties and not to punish them for their mistakes, negligence or shortcomings. The exercise of discretionary power must be governed by judicial considerations and the wider the discretion, the greater the care and circumspection.

Ordinarily, the following principles should be borne in mind in dealing with applications for amendment of pleadings:

- (i) all amendments should be allowed which are necessary for determination of the real controversies in the suit;
- (ii) the proposed amendment should not alter and be a substitute for the cause of action on the basis of which the original *lis* was raised;
- (iii) inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment;
- (iv) proposed amendments should not cause prejudice to the other side which cannot be compensated by means of costs
- (v) amendment of a claim or relief barred by time should not be allowed;
- (vi) no amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;
- (vii) no party should suffer on account of technicalities of law and the amendment should be allowed to minimize the litigation between the parties;

- (viii) the delay in filing petitions for amendments of pleadings should be properly compensated for by costs;
- (ix) error or mistake which if not fraudulent should not be made a ground for rejecting the application for amendments of pleadings;
- (x) The above principles are illustrative and not exhaustive.<sup>171</sup>

### (p) At any stage of proceedings

Leave to amend may be granted at any stage of the proceedings. Such amendment applications are not governed by any law of limitation.<sup>172</sup> Leave to amend may be granted before, or at, or after the trial, or in First Appeal<sup>173</sup>, or in Second Appeal<sup>174</sup>, or in Revision<sup>175</sup>, or in the Supreme Court<sup>176</sup> or even in execution proceedings<sup>177</sup>, provided the decree is legal, lawful and enforceable, not otherwise.<sup>178</sup>

Proviso to Rule 17, as inserted by the Amendment Act of 2002, now restricts and curtails the power of the court and declares that the court should not allow such amendment after the commencement of the trial unless it comes to the conclusion that in spite of due diligence, the

171. *Dalip Kaur v Major Singh*, AIR 1996 P&H 107 at p. 108

172. *Ganga Bai v. Vijay Kumar*, (1974) 2 SCC 393; AIR 1974 SC 1126; *Arundhati Mishra v Ram Charitra Pandey*, (1994) 2 SCC 29, see also *supra*, "Limitation".

173. S. 107. See also *Pirgonda Patil v. Kalgonda Patil*, AIR 1957 SC 363 at p. 365; *Nanduri Yogananda Lakshminarasimhachari v. Agastheswaraswamiwaru*, AIR 1960 SC 622 at p. 624 (1960) 2 SCR 768, *Nair Service Society Ltd v K C Alexander*, AIR 1968 SC 1165 at p. 1178; (1968) 3 SCR 163, *Mohd. Mustafa v. Abu Bakar*, (1970) 3 SCC 891. AIR 1971 SC 361, *Gangabai v. Vijay Kumar*, (1974) 2 SCC 393, *Pandit Ishwardas v. State of M.P.*, (1979) 4 SCC 163; AIR 1979 SC 551 (1979) 2 SCR 424, *Harcharan v. State of Haryana*, (1982) 3 SCC 408 at pp. 410-11; AIR 1983 SC 43 at p. 45.

174. S. 108. See also *Laxmidas v. Nanabhai*, AIR 1964 SC 11 at p. 18; (1964) 2 SCR 567; *Shikharchand Jain v. Digamber Jain Praband Karim Sabha*, (1974) 1 SCC 675. AIR 1974 SC 1178, *Hasmat Rai v. Raghunath Prasad*, (1981) 3 SCC 103. AIR 1981 SC 1711, *Bakshish Singh v. Prithi Pal Singh*, 1995 Supp (3) SCC 577, *Arundhati Mishra v. Ram Charitra Pandey*, (1994) 2 SCC 29

175. *Charan Dass v. Kripal Singh*, 1977 RCJ 924; *Netai Chandra v. Gour Mohan*, AIR 1976 Cal 58 at p. 59; *Pasupuleti Venkateswarlu v. Motor & General Traders*, (1975) 1 SCC 770. AIR 1975 SC 1409; *Vineet Kumar v. Mangal Sam*, (1984) 3 SCC 352 at p. 360-61; AIR 1985 SC 817 at p. 820-21; *Ganesh Trading Co. v. Moji Ram*, (1978) 2 SCC 91; AIR 1978 SC 484.

176. *L.J. Leach & Co. Ltd v Jaidine Skinner & Co.*, AIR 1957 SC 357; 1957 SCR 438; *A K. Gupta and Sons Ltd v. Damodar Valley Corpn.*, AIR 1967 SC 96 (1966) 1 SCR 796; *Mulk Raj Batra v. District judge*, (1982) 3 SCC 233; AIR 1982 SC 24; *S. Kumar v Institute of Constitutional & Parliamentary Studies*, (1983) 4 SCC 516 AIR 1984 SC 59 *Saroj Rani v Sudarshan Kumar Chadha*, (1984) 4 SCC 90

177. *C T.A. CT. Nachiappa Chettiar v M G Ramaswami Pillai*, AIR 1964 Mad 236 at p. 237; *Shrikant Roguvar v Jaidev Saurto*, AIR 1975 Goa 24, *Ex-Servicemen Enterprises (P) Ltd v. Sumey Singh*, AIR 1976 Del 56.

178. *Rukmini Devi v. Pawan Kumar*, AIR 1979 Pat 88

matter could not have been raised by the party before the commencement of the trial.<sup>179</sup>

### (q) Amendment after commencement of trial: Proviso

Proviso to Rule 17, as inserted by the Code of Civil Procedure (Amendment) Act, 2002 restricts and curtails power of the court to allow amendment in pleadings by enacting that no application for amendment should be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter (for which amendment is sought) before the commencement of the trial.<sup>180</sup>

### (r) Doctrine of "relation back"

Normally, an amendment relates back to the pleading, but the doctrine is not absolute, unqualified or of universal application.<sup>181</sup> In appropriate cases, the court may order that the amendment would take effect from the date an application was made or the amendment was allowed and not from the date when the plaint or written statement was presented.<sup>182</sup>

### (s) Limitation

No period of limitation is prescribed either in the Code of Civil Procedure or in the Limitation Act for making an application for amendment.<sup>183</sup> On the contrary, Rule 17 permits a party to alter or amend his pleading "at any stage" of the proceedings.<sup>184</sup>

But it is well-settled that ordinarily, an amendment of pleading should not be allowed if the effect of such amendment is to deprive a party of a right which he has acquired by virtue of the law of limitation.<sup>185</sup>

179 For detailed discussion, see *supra*, "Amendment after commencement of trial Proviso".

180. *Usha Devi v. Rujeeb Ahmad*, (2008) 3 SCC 717, *Aruntraprasadji N. Pandey v. Suman Keshanprakashdesai N.*, (2006) 12 SCC 1, AIR 2007 SC 806, *Baldev Singh v. Manohar Singh*, (2006) 6 SCC 498, AIR 2006 SC 2832, *Salem Advocate Bar Assn. II v. Union of India* (2005) 6 SCC 344.

181. *Brij Kishore v. Musutari Khatoon*, AIR 1976 All 399, *Siddalingamma v. Mamtha Shetty*, (2001) 8 SCC 567, AIR 2001 SC 2506.

182. *Vishuambhar v. Laxminarayana*, (2001) 6 SCC 163, AIR 2001 SC 2637, *Sampath Kumar v. Anuradha*, (2002) 7 SC 550.

183. *Ganga Bai v. Vinay Kumar*, (1974) 2 SCC 393, AIR 1974 SC 1126, *Arumugam Muthu v. Ram Chandra Pandey*, (1994) 2 SC 70.

184. For detailed discussion, see *supra*, "At any stage of proceedings".

185. For detailed discussion, see *supra*, "Leave to amend when refused".

The above principle also must be read in the light of proviso to Rule 17 inserted by the Amendment Act of 2002.<sup>186</sup>

#### (t) *Res judicata*

Strict rule of *res judicata* does not apply to amendment of pleadings.<sup>187</sup>

#### (u) Successive applications

As a general rule, once an application for amendment is rejected on merits, a second application on the same averments is not maintainable. But, if there is change of circumstances, an application for amendment may be filed provided no prejudice is caused to the other side. Similarly, a fresh application would also lie if earlier one is withdrawn or dismissed for default or not decided on merits.<sup>188</sup>

#### (v) On such terms as may be just

The rule confers an unfettered discretion on the court as to the terms to be imposed while granting an amendment of pleadings. Generally, amendment will be allowed on payment of costs to the opposite party by the party amending his pleadings.<sup>189</sup> The costs awarded, however, should be reasonable and not exemplary.<sup>190</sup>

There has been divergence of judicial opinion whether a party who has accepted costs under an order of amendment can subsequently challenge the validity of the order of amendment. One view is that he cannot, since he has taken benefit (of costs) under that order. The other view is that he can, since award of costs has nothing to do with the validity or otherwise of an order of amendment.

In *Bijendra Nath v. Mayank Srivastava*<sup>191</sup>, the Supreme Court rightly held that the doctrine of estoppel precluding the party from challenging an order of amendment would apply where the party has accepted the costs as a condition precedent to the amendment. This principle cannot be invoked in a case where a direction issued for payment of costs is independent of the exercise of discretionary power of the court.

186 For detailed discussion, see *supra*, "Amendment after commencement of trial: Proviso".

187 For detailed discussion of "*Res judicata*", see *supra*, Chap. 2.

188. For detailed discussion of "*Res judicata*", see *supra*, Chap. 2.

189 *Chintaman Kaushal v. Shanker*, AIR 1951 Nag 128, *Paatali Raut v. Khulana Bewa*, AIR 1985 Ori 165 at p. 168.

190. *Jash Behari v. Jagnandan Singh*, AIR 1974 Pat 18

191 (1994) 6 SCC 117 at p. 132. AIR 1994 SC 2562 at p. 2572-73.

### (w) Appeal

An order allowing or disallowing an application for amendment is neither a "decree" as defined in Section 2(2) nor an order appealable under Section 104 read with Order 43 of the Code. No appeal, therefore, lies against such an order. An order allowing or disallowing application, however, may be attacked in an appeal from a decree.

### (x) Revision

An order granting or refusing amendment is a "case decided" and is subject to the revisional jurisdiction of the High Court.<sup>192</sup>

Since it is at the discretion of the court to allow an amendment, while exercising powers under Section 115 of the Code, normally, the High Court will not interfere with exercise of discretion by the trial court.<sup>193</sup>

As has been said, "It is well-settled that the court should be extremely liberal in granting prayer of amendment of pleadings unless serious injustice or irreparable loss is caused to the other side. *It is also clear that a revisional court ought not to lightly interfere with a discretion exercised in allowing amendment in absence of cogent reasons or compelling circumstances.*"<sup>194</sup> (emphasis supplied)

### (y) Writ petition

Though, it is open to an aggrieved party to challenge an order passed by the trial court allowing or rejecting an application for amendment of pleading by filing a writ petition under Article 226 or 227 of the Constitution of India, *normally*, a High Court will not exercise extraordinary or supervisory jurisdiction to interfere with the order of the trial court unless it has caused serious prejudice to the applicant or has resulted in miscarriage of justice.

*Ordinarily*, the Supreme Court will also not exercise its power under Article 136 of the Constitution by interfering with the order passed by the High Court on an application for amendment.

### (z) Failure to amend: Rule 18

If a party, who has obtained an order for leave to amend, does not amend accordingly within the time specified for that purpose in the order or if

192 For detailed discussion, see *infra*, "Revision" Pt. III, Chap. 9

193 *Maitreyee Banerjee v. Prabir Kumar* (1982) 3 SCC 217 AIR 1982 SC 17, *Panchdeo Narain v. Jyoti Sahay*, 1984 Supp SCC 594 AIR 1983 SC 462, *Usha Batashahel v. Kiran Appase* (2007) 5 SCC 602 AIR 2007 SC 1663

194 *Hemlata Andas Phatani v. G. S. Kustom Kermani*, (1984) 1 SCC 668 AIR 1983 SC 319, *D L F. United (P) Ltd. v. Prem Raj* (1981) 1 SCC 433 AIR 1981 SC 805, *Mulk Raj Etenra v. District Judge* (1982) 3 SCC 233 AIR 1982 SC 24

no time is specified then, within 14 days from the date of the order, he shall not be permitted to amend after expiry of the specified time or of 14 days unless the time is extended by the court.<sup>195</sup> It does not, however, result in dismissal of the suit. Again, the court has discretion to extend the time even after the expiry of the period originally fixed.<sup>196</sup> In an appropriate case, the court may allow the amendment to be carried out by the party in spite of his default on payment of further costs.<sup>197</sup>

The reason is simple. "We cannot be oblivious of facts of life, namely, the parties in courts are mostly ignorant and illiterate—unversed in law. Sometimes their counsel are also inexperienced and not properly equipped", and the court should endeavour to ascertain the truth to do justice to the parties.<sup>198</sup>

195. R 18. See also *Dilbagh Rai Jarry v. Union of India*, (1974) 3 SCC 554 at p. 560; AIR 1974 SC 130 at p. 135, *B Channabyre Gowda v. State of Mysore*, AIR 1974 Kant 136 at p. 138.

196. *Bhugwan Das v. Haji Abu*, ILR (1892) 16 Bom 263, *Rahmat Bi v. R Krishna Doss*, AIR 1940 Mad 641, *Banku Ramulu Patrudu v. Konda Narayana*, AIR 1962 AP 527; *Nareshchandra v. State of Gujarat*, AIR 1977 Guj 109, *Ramesh Bejoy v. Pashupati Rai*, (1979) 4 SCC 27 at p. 40. AIR 1979 SC 1769 at p. 1779, *Pahali Raut v. Khulana Bewa*, AIR 1985 Ori 165, *Konkan Trading Co. v. Suresh Govind*, (1986) 2 SCC 424. AIR 1986 SC 1009 at p. 1010.

197. *Jainul Abedin v. Bibi Nisha Khatoon*, AIR 1984 Pat 251 at p. 252; *Pahali Raut v. Khulana Bewa*, AIR 1985 Ori 165.

198. *Pahali Raut v. Khulana Bewa*, AIR 1985 Ori 165, at pp. 167-68; see also *M C Mehta v. Union of India*, (1987) 1 SCC 395. AIR 1987 SC 1086, *Bachhraj Factories (P) Ltd v. Paramsukhdas*, AIR 1993 Bom 175.

# CHAPTER 7

## Plaint and Written Statement

### SYNOPSIS

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## 1. GENERAL

This Chapter discusses two important topics, namely, (i) *plaint*; and (ii) *written statement* and the matters incidental thereto.

Rules 1 to 8 of Order 7 relate to particulars in a *plaint*. Rule 9 lays down procedure on *plaint* being admitted. Whereas Rules 10 to 10-B provide for return of *plaint*, and appearance of parties, Rules 11 to 13 deal with rejection of *plaint*. Rules 14 to 17 contain provisions for production of documents. Order 7 should be read with Section 26 of the Code.

Order 3 enables a party to appear in a court either in person, or through a recognized agent or through a pleader.

Order 5 deals with summons to a defendant. It contains provisions regarding issuance and service of summons. This order should be read with Sections 27 to 29 of the Code.

Order 8 enacts law relating to a written statement. Rules 1 to 5 and 7 to 10 require particulars to be stated in written statement, grounds of defence and production of documents. Rules 6 and 6-A to 6-G deal with doctrines of set-off and counterclaim respectively.

## 2. PLAINT: ORDER 7

### (a) Meaning

The expression "*plaint*" has not been defined in the Code. However, it can be said to be a statement of claim, a document, by presentation of

which the suit is instituted. Its object is to state the grounds upon which the assistance of the court is sought by the plaintiff. It is a pleading of the plaintiff.<sup>1</sup>

## (b) Particulars<sup>2</sup>: Rules 1-8

Every plaint should contain the following particulars:

- (i) The name of the court in which the suit is brought;<sup>3</sup>
- (ii) The name, description and place of residence of the plaintiff;<sup>4</sup>
- (iii) The name, description and place of residence of the defendant.<sup>5</sup>
- (iv) Where the plaintiff or defendant is a minor or a person of unsound mind, a statement to that effect;<sup>6</sup>
- (v) The facts constituting the cause of action and when it arose;<sup>7</sup>
- (vi) The facts showing that the court has jurisdiction;<sup>8</sup>
- (vii) A statement of the value of the subject-matter of the suit for the purpose of jurisdiction and court fees;<sup>9</sup>
- (viii) The reliefs claimed by the plaintiff, simply or in the alternative;<sup>10</sup>
- (ix) Where the plaintiff files a suit in a representative capacity, the facts showing that the plaintiff has an actual existing interest in the subject-matter and that he has taken steps that may be necessary to enable him to file such a suit;<sup>11</sup>
- (x) Where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished;<sup>12</sup>
- (xi) Where the suit is for recovery of money, the precise amount claimed;<sup>13</sup>
- (xii) Where the suit is for accounts or *mesne profits* or for movables in the possession of the defendant or for debts which cannot be determined, the approximate amount or value thereof;<sup>14</sup>
- (xiii) Where the subject-matter of the suit is immovable property a description of the property sufficient to identify it, e.g. boundaries, survey numbers, etc.;<sup>15</sup>
- (xiv) The interest and liability of the defendant in the subject-matter of the suit;<sup>16</sup>
- (xv) Where the suit is time-barred, the ground upon which the exemption from the law of limitation is claimed.<sup>17</sup>

1 Or 6 R 1: see also *Girija Bai v. Thakur Das*, AIR 1967 Mys 217

2 For a Model plaint see, Appendix A

3 R 1(a)

4 R 1(b)

5 R 1(c)

6 R 1(d)

7 R 1(e)

8 R 1(f)

9 R 1(i)

10 R 1(g) see also, Rr 7, 8

11 R 4

12 R 1(h)

13 R 2

14 R 2

15 R 3

16 R 5

17 R 6 (The proviso, however, empowers the court to permit the plaintiff to rely on a new ground for exemption, if it is not inconsistent with the ground shown in the plaint.) See also *supra*, Or 6 Rr 2, 3, 4, 9, 10, 14, 14-A & 15

Let us consider some important aspects in detail:

**(i) Parties to suit**

There must be two parties in every suit, namely, the plaintiff and the defendant. There may, however, be more than one plaintiff or more than one defendant. But there must be at least one plaintiff and one defendant in every suit. All particulars, such as name, father's name, age, place of residence, etc., which are necessary to identify the parties, must be stated in the plaint.

**(ii) Cause of action**

Every suit presupposes the existence of a cause of action against the defendant because if there is no cause of action, the plaint will have to be rejected.<sup>18</sup>

Even though the expression "cause of action" has not been defined in the Code, it may be described as "a bundle of essential facts, which it is necessary for the plaintiff to prove before he can succeed"<sup>19</sup>, or "which gives the plaintiff right to relief against the defendant".<sup>20</sup> Thus, "cause of action" means every fact, which it is necessary to establish to support a right or obtain a judgment.<sup>21</sup> To put it differently, cause of action gives occasion for and forms the foundation of the suit.<sup>22</sup>

The classic definition of the said expression is found in the case of *Cooke v. Gill*<sup>23</sup>, wherein Lord Brett observed:

"Cause of action means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court."<sup>24</sup>

18. R. 11(a).

19. *Ganesh Trading Co. v. Moji Ram*, (1978) 2 SCC 91; AIR 1978 SC 484; *A B C Laminart (P) Ltd v. A P. Agencies*, (1989) 2 SCC 163, *Bloom Dekor Ltd. v. Subhash Himatlal Desai*, (1994) 6 SCC 322 at p. 328, *Alchemist Ltd. v. State Bank of Sikkim*, (2007) 11 SCC 335. AIR 2007 SC 1812, *Laxman Prasad v. Prodigy Electronics Ltd*, (2008) 1 SCC 618, *Dadu Dayalu Mahasabha, Jaipur (Trust) v. Mahant Ram Niwas*, (2008) 11 SCC 753; AIR 2008 SC 2187.

20. *A B C Laminart (P) Ltd v. A P. Agencies*, (1989) 2 SCC 163 at p. 170, *Swamy Atmananda v. Sri Ramakrishna Tapovanam*, (2005) 10 SCC 51.

21. *Sadanandan v. Madhavan*, (1998) 6 SCC 514 at p. 518; AIR 1998 SC 3043.

22. *Ibid*, see also *Sidramappa v. Rajashetty*, (1970) 1 SCC 186 at p. 189; AIR 1970 SC 1059 at p. 1061.

23. (1873) 8 CP 107 at p. 116; 21 WR 334; 28 LT 32; 42 LJ CP 98.

24. *Ibid*, at p. 116 (CP). See also *State of Madras v. C.P. Agencies*, AIR 1960 SC 1309, *A K Gupta and Sons Ltd. v. Damodar Valley Corpn.*, AIR 1967 SC 96. (1966) 1 SCR 796, *Ganesh Trading Co v. Moji Ram*, (1978) 2 SCC 91; *A.B.C. Laminart (P) Ltd. v. A P Agencies*, (1989) 2 SCC 163, *Bloom Dekor Ltd. v. Subhash*, (1994) 6 SCC 322, *Alchemist Ltd. v. State Bank of Sikkim*, (2007) 11 SCC 335. AIR 2007 SC 1812; *Laxman Prasad v. Prodigy Electronics Ltd*, (2008) 1 SCC 618.

Cause of action has nothing to do with the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour.<sup>25</sup> It must be antecedent to the institution of the suit<sup>26</sup> and on the basis of that cause of action the suit must have been filed. Whether any particular facts constitute a cause of action has to be determined with reference to the facts of each case, taking into consideration the substance of the matter rather than the form of action.<sup>27</sup>

It is also necessary for the plaintiff to state specifically when such cause of action arose. This will enable the defendant as well as the court to ascertain from the plaint whether in *fact* and in *law* the cause of action as alleged by the plaintiff in the plaint did arise or not.

In *Kuldeep Singh v. Ganpat Lal*<sup>28</sup>, the Supreme Court stated, "The object underlying Order 7 Rule 1(e), which requires that the plaint shall contain the particulars about the facts constituting the cause of action and when it arose, is to enable the court to find out whether the plaint discloses the cause of action because the plaint is liable to be rejected under Order 7 Rule 11 CPC if it does not disclose the cause of action. The purpose behind the requirement that the plaint should indicate when the cause of action arose is to help the court in ascertaining whether the suit is not barred by limitation. Any error on the part of the plaintiff in indicating the date on which the cause of action arose would be of little consequence if the cause of action had arisen on the date on which the suit was filed and the suit was within limitation from the said date. The error in mentioning the date on which the cause of action had arisen in the plaint in such a case would not disentitle the plaintiff from seeking relief from the court in the suit."<sup>29</sup>

Thus, in a suit for possession against the tenant on the ground of non-payment of rent, the period for which the tenant has been in default must be stated. So also in a suit on a promissory note on demand, it must be stated that in spite of the demand being made, no payment was made by the promisee-defendant. Similarly, in a suit for damages for

25 *Chand Kour v. Partab Singh*, (1889) 16 Cal 98 at p. 102. *State of Madras v. C. P. Agencies* *supra*, *A. R. C. Laminart (P) Ltd. v. A. P. Agencies*, (1989) 2 SCC 163.

26 *Ganesh Trading Co. v. Moji Ram*, (1978) 2 SCC 91. AIR 1978 SC 484. *A. R. C. Laminart (P) Ltd. v. A. P. Agencies* (1989) 2 SCC 163. *Bloom Dekor Ltd. v. Subhash Hymat & Desai* (1994) 6 SCC 322 at p. 328. *Alchemist Ltd. v. State Bank of Sikkim* (2007) 11 SCC 335. AIR 2007 SC 1812. *Laxman Prasad v. Prodigy Electronics Ltd.* (2008) 1 SCC 658. *Dadu Dayalu Mahasabha Jaipur (Trust) v. Mahant Ram Nitwas* (2008) 11 SCC 753. AIR 2008 SC 2187.

27 *L. Janakirama Iyer v. P. M. Nilakanta Iyer* AIR 1962 SC 633. 1962 Supp. (1) SCR 206.

28 (1996) 1 SCC 243. AIR 1996 SC 729.

29 *Ibid.* at pp. 246-47. SCC (1) at p. 731 (AIR).

breach of contract, it must be stated that the contract was entered into between the plaintiff and the defendant and that the defendant had committed breach thereof. Likewise, in a suit for specific performance of an agreement the plaintiff must state that he was and is ready and willing to perform his part of the agreement. Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, he should state them as far as possible separately and distinctly.<sup>30</sup>

But for deciding whether the facts averred by the plaintiff would or would not constitute cause of action, partly or wholly, the court must consider whether such facts constitute material, essential or integral part of the cause of action. If it is, it forms a cause of action, but if it is not, it does not form a cause of action. In determining the said question, the substance of the matter and not the form thereof should be considered. *"It is no doubt true that even if a small fraction of the cause of action arises within the jurisdiction of the court, the court would have territorial jurisdiction to entertain the suit. Nevertheless it must be a 'part of cause of action', nothing less than that"*<sup>31</sup> (emphasis supplied)

### (iii) Jurisdiction of court

The plaint must state all the facts showing how the court has pecuniary and territorial jurisdiction over the subject-matter of the suit.<sup>32</sup> When the jurisdiction of a court to entertain the suit is disputed by the defendant, the court may frame the issue to that effect and decide the same before deciding other issues.<sup>33</sup>

### (iv) Valuation

The plaintiff must state in the plaint the valuation of the subject-matter of the suit for the purposes of pecuniary jurisdiction of the court and court fees. Sometimes, the valuation of the subject-matter for both the purposes may be the same, as, for example, in a suit for recovery of money. But sometimes, two valuations may differ, as, for example, in a suit for declaration or in a suit for injunction or for possession of immovable property. In such a case, the plaintiff should *distinctly* state the valuation of the suit for the purpose of jurisdiction of the court and for the purpose of court fees.<sup>34</sup>

30 R 8.

31. *Alchemist Ltd. v. State Bank of Sikkim*, (2007) 11 SCC 335 at p. 346. AIR 2007 SC 1812 (per Thakker, J.)

32. For detailed discussion of "Jurisdiction of court", see *supra*, Chap. 4.

33. Or. 14 R. 2(2). See *infra*, Chap. 10.

34. For detailed discussion, see *supra*, Chap. 4

### (v) Limitation: Rule 6

Rule 6 provides that where the suit is barred by limitation, it is necessary for the plaintiff to show the ground of exemption in the plaint. But the proviso added by the Amendment Act of 1976 empowers the court to permit the plaintiff to rely on a new ground for exemption if it is not inconsistent with the grounds mentioned in the plaint.

### (vi) Relief: Rules 7-8

Every plaint must state specifically the relief claimed by the plaintiff either simply or in the alternative. Where the relief is founded on separate and distinct grounds, they should be so stated.<sup>35</sup> Where the plaintiff is entitled to more than one relief in respect of the same cause of action, it is open to him to claim all or any of such reliefs. But if he omits, except with the leave of the court, to sue for any particular relief, he will not afterwards be allowed to sue for the relief so omitted.<sup>36</sup>

It is not necessary to ask for general or other relief.<sup>37</sup> But the general relief is usually prayed for by the plaintiff in the plaint in the following terms:

"The plaintiff prays for such further or other relief as the nature of the case may require."

Strictly speaking, this type of prayer is not necessary since such relief may be granted by the court as if it has been asked for, provided it is not inconsistent with the specific claim raised in the pleadings.<sup>38</sup> The same rule applies to any relief claimed by the defendant in his written statement.<sup>39</sup>

The court must have regard for all the relief and look at the substance of the matter and not at its form.<sup>40</sup> As, for example, prayer for costs need not be added in the plaint since as a general rule costs follow the event<sup>41</sup>, and the court is bound to decide the point. Similarly, in a

35. Rr. 1(9), 7, 8; see also *Kedar Lal v. Hari Lal*, AIR 1952 SC 47; 1952 SCR 179, *V.R. Subramanyam v B. Thayappa*, AIR 1966 SC 1034 (1961) 3 SCR 663, *Omi Prakash v. Ram Kumar*, (1991) 1 SCC 441, AIR 1991 SC 409, *Gitaram Paul v. Dibyendra Kundu* (1991) 1 SCC 1; AIR 1991 SC 395, *Lakshmi Ram v. Hari Prasad*, (2003) 1 SCC 197; AIR 2003 SC 351.

36. Or. 2 R. 2(3), see *supra*, Chap. 5.

37. R. 7. See also *Kedar Lal v. Hari Lal*, AIR 1952 SC 47 at p. 52; 1952 SCR 179, *Hindalco Industries Ltd. v. Union of India*, (1994) 2 SCC 594 at p. 508.

38. *Rajendra Tiwary v. Basudeo Prasad* (2002) 1 SCC 90 at p. 94.

39. R. 7.

40. *Hindalco Industries Ltd. v. Union of India*, (1994) 2 SCC 594 at p. 508; *L. Janakirama Iyer v. P.M. Nilakanta Iyer*, AIR 1962 SC 633, 1962 Supp. (1) SCR 206; *Bhagwati Prasad v. Chandramauli*, AIR 1966 SC 735 (1966) 2 SCR 286, *State of Haryana v. Haryana Coop. Transport Ltd.* (1977) 1 SCC 271; AIR 1977 SC 237.

41. S. 35; see also *infra*, Chap. 15.

suit for possession and mesne profits, the court can grant future mesne profits even if they are not specifically asked for.<sup>42</sup>

The plaintiff should state specifically the relief which he claims either simply or in the alternative.<sup>43</sup> As stated above, it is open to the plaintiff to pray for an alternative relief even though it may be inconsistent, provided that it is maintainable and not prohibited by any law.<sup>44</sup> Where a question arises as to whether the plaintiff has asked for a particular relief in his plaint, the plaint must be read as a whole and the substance of the matter and not the form thereof should be considered.<sup>45</sup>

In *Bhagwati Prasad v. Chandramaul*<sup>46</sup>, the Supreme Court explained the principle thus:

"The general rule, no doubt, is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the court cannot do injustice to another."<sup>47</sup> (emphasis supplied)

The suit cannot be dismissed merely on the ground that the plaintiff has claimed a larger relief than he is entitled to. But the lesser relief to which the plaintiff is entitled will be granted in his favour.<sup>48</sup> But the court cannot grant a larger relief to the plaintiff than that claimed by

42. *Gopalakrishna Pillai v. Meenakshi Ayal*, AIR 1967 SC 155; 1966 Supp SCR 128.

43. R 7, see also *Kedar Lal v. Hari Lal*, AIR 1952 SC 47; 1952 SCR 179, *Rajendra Tiwary v. Basudeo Prasad*, (2002) 1 SCC 90 at p. 94.

44. *Ibid.* For detailed discussion, see *supra*, "Alternative and inconsistent pleadings": Chap. 6

45. *L. Janakirama Iyer v. P.M. Nilakanta Iyer*, AIR 1962 SC 633; 1962 Supp (1) SCR 206; *Bhagwati Prasad v. Chandramaul*, AIR 1966 SC 735 at p. 738 (1966) 2 SCR 286; *Corpn. of the City of Bangalore v. M. Papaiah*, (1989) 3 SCC 612. AIR 1989 SC 1809.

46. AIR 1966 SC 735 (1966) 2 SCR 286.

47. *Ibid.* at p. 738 (AIR) (per Gajendragadkar, C.J.).

48. *Vishram Arjun v. Irukiulla Shankariah*, AIR 1957 AP 784 at p. 792; *Makhan Lal v. Mahaluxmi Bank Ltd.*, AIR 1968 Cal 90; *Kedar Lal v. Hari Lal*, AIR 1952 SC 47, *B.R. Ramabhadriah v. Food & Agricultural Deptt.*, (1981) 3 SCC 528. AIR 1981 SC 1653, *Udhav Singh v. Madhav Rao Scindia*, (1977) 1 SCC 511; AIR 1976 SC 744, *Krishna Priya v. University of Lucknow*, (1984) 1 SCC 307. AIR 1984 SC 186, *Hindalco Industries Ltd v. Union of India*, (1994) 2 SCC 594, *Rajendra Tiwary v. Basudeo Prasad*, (2002) 1 SCC 90; AIR 2002 SC 136.

him even if he is entitled to it unless he gets his plaint amended with the leave of the court.<sup>49</sup>

### (c) Events happening after institution of suit

The basic rule is that the rights of the parties should be determined on the basis of the date of filing of the suit.<sup>50</sup> Thus, where the plaintiff has no cause of action on the date of the filing of the suit, he will not ordinarily be allowed to take advantage of the cause of action arising subsequent to the filing of the suit.<sup>51</sup> Similarly, no relief will be refused to the plaintiff by reason of any subsequent event if at the date of the institution of the suit, he has a substantive right.<sup>52</sup>

This, however, does not mean that no events happening after the institution of a suit can be taken into account at all. In appropriate

49. *Ibid*; see also *Putta Kannayya v. Rudrabhatla Venkata*, AIR 1918 Mad 998 (2) at p. 1002 (FB). See also *Subhas Chandra v. Ganga Prosad*, AIR 1967 SC 878. (1967) 1 SCR 331, *Krishna Priya v. University of Lucknow*, (1984) 1 SCC 307: AIR 1984 SC 186, *Trojan & Co. v. R.M.N.N. Nagappa Chettiar*, AIR 1953 SC 235 at p. 240: 1953 SCR 789, *Thakamma Mathew v. M. Azamathulla Khan*, 1993 Supp (4) SCC 492: AIR 1993 SC 1120; *Sidramappa v. Rajashetty*, (1970) 1 SCC 186: AIR 1970 SC 1059, *Om Prakash v. Ram Kumar*, (1991) 1 SCC 441: AIR 1991 SC 409, *State of Bihar v. Radha Krishna*, (2002) 6 SCC 308: AIR 2002 SC 2755.

50. *Lachmeshwar Prasad v. Keshwar Lal*, AIR 1941 FC 5: 1940 FCR 84; *Pasupuleti Venkateswarlu v. Motor & General Traders*, (1975) 1 SCC 770. AIR 1975 SC 1409, *Mahalinga Thambiran v. Arulnandi Thambiran*, (1974) 1 SCC 150 at pp. 166-67: AIR 1974 SC 199 at p. 209; *Rameshwar v. Jot Ram*, (1976) 1 SCC 194 at pp. 199-200: AIR 1976 SC 49 at p. 52; *Nair Service Society Ltd v K C. Alexander*, AIR 1968 SC 1165 at p. 1178 (1968) 3 SCR 163; *Ramji Dayawala & Sons (P) Ltd v. Invest Import*, (1981) 1 SCC 80 at p. 98-99: AIR 1981 SC 2085 at p. 2096, *Satish Chand Makhan v. Govardhan Das*, (1984) 1 SCC 369 at pp. 373-74. AIR 1984 SC 143 at p. 145; *Vineet Kumar v. Mangal Sain*, (1984) 3 SCC 352 at pp. 359-60. AIR 1985 SC 817 at p. 820, *Kanaya Ram v. Rajender Kumar*, (1985) 1 SCC 436 at pp. 440-41: AIR 1985 SC 371 at pp. 374-75; *Nand Kishore Marwah v. Samundri Devi*, (1987) 4 SCC 382 at pp. 389-90, *P. Sriramamurthy v. Vasantha Raman*, (1997) 9 SCC 654, *Jai Mangal Oraon v. Mira Nayak*, (2000) 2 SCC 141; *Lekh Raj v. Muni Lal*, (2001) 2 SCC 762 AIR 2001 SC 996, *Om Prakash v. Ranbir B. Goyal*, (2002) 2 SCC 256. AIR 2002 SC 665; *Ram Nibas v. Debojyoti Das*, (2003) 1 SCC 472, *Rajesh D. Darbar v. Narasingrao Krishnaji*, (2003) 7 SCC 219, *Jai Prakash Gupta v. Riyaz Ahmad*, (2009) 10 SCC 197

51. *Rameshwar v. Jot Ram*, (1976) 1 SCC 194 at pp. 199-200; *Shikharchand Jain v. Digamber Jain Praband Karim Sabha*, (1974) 1 SCC 675 AIR 1974 SC 1178

52. *Pasupuleti Venkateswarlu v. Motor & General Traders*, (1975) 1 SCC 770. AIR 1975 SC 1409, *Mahalinga Thambiran v. Arulnandi Thambiran*, (1974) 1 SCC 150 at pp. 166-67: AIR 1974 SC 199 at p. 209, *Rameshwar v. Jot Ram*, (1976) 1 SCC 194 at pp. 199-200: AIR 1976 SC 49 at p. 52. *Nair Service Society Ltd v K C. Alexander* AIR 1968 SC 1165 at p. 1178 (1968) 3 SCR 163, *Ramji Dayawala & Sons (P) Ltd v. Invest Import* (1981) 1 SCC 80 at pp. 98-99. AIR 1981 SC 2085 at p. 2096, *Satish Chand Makhan v. Govardhan Das* (1984) 1 SCC 369 at pp. 373-74. AIR 1984 SC 143 at p. 145. *Vineet Kumar v. Mangal Sain* (1984) 3 SCC 352 at pp. 359-60. AIR 1985 SC 817 at p. 820. *Kanaya Ram v. Rajender Kumar* (1985) 1 SCC 436 at pp. 440-41. AIR 1985 SC 371 at pp. 374-75. *Nand Kishore Marwah v. Samundri Devi* (1987) 4 SCC 382 at pp. 389-90.

cases, it is not only the right but the duty of the court to consider the changed circumstances. Where it is shown that the original relief claimed by the plaintiff has, by reason of subsequent change in the circumstances, become useless or inappropriate or where it is necessary to take notice of changed circumstances to shorten litigation, a new relief may serve the purpose better or that a relief is required to be reshaped or moulded in the light of change in facts or in law to do full and complete justice between the parties, the court is bound to depart from the above rule and mould the relief in the light of altered circumstances.<sup>53</sup> In *Amarjit Singh v Khatoon Quamaram*<sup>54</sup>, the Supreme Court observed, "Administration of justice demands that any change either in fact or in law must be taken cognizance of by the court but that must be done in a cautious manner of relevant facts. Therefore, *subsequent events can be taken cognizance of if they are relevant and material.*" (emphasis supplied)

In the leading case of *Pasupuleti Venkateswarlu v. Motor & General Traders*<sup>55</sup>, Krishna Iyer, J. rightly propounded:

"It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the *lis* has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fair play is violated, with a view to promote substantial justice—subject, of course, to the absence of other disentitling factors or just circumstances. Nor can the court contemplate any limitation on this power to take note of updated facts to confine it to the trial court. If the litigation pends, the power exists, absent of other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myriad. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognizance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed."<sup>56</sup> (emphasis supplied)

53. *Shikharchand Jain v Digamber Jain Praband Karini Sabha*, (1974) 1 SCC 675, *Pasupuleti Venkateswarlu v Motor & General Traders*, (1975) 1 SCC 770, *Rameshwar v Jot Ram*, (1976) 1 SCC 194, *Laxmi & Co. v Dr. Anant R. Deshpande*, (1973) 1 SCC 37 at p. 45; AIR 1973 SC 171 at p. 177; *Vineet Kumar v. Mangal Sam*, (1984) 3 SCC 369, *Jai Prakash Gupta v Riyaz Ahamad*, (2009) 10 SCC 197.

54. (1986) 4 SCC 736 at p. 743 AIR 1987 SC 741.

55. (1975) 1 SCC 770. AIR 1975 SC 1409.

56. *Ibid*, at pp. 772-73 (SCC) at p. 1410 (AIR). See also *Vineet Kumar v Mangal Sam*, (1984) 3 SCC 369.

It is submitted that the following observations in *Ramji Lal v. State of Punjab*<sup>57</sup>, lay down correct law on the point and are, therefore, worth quoting:

"It is true that courts do very often take notice of events that happen subsequent to the filing of suits and at times even those that have occurred during the appellate stage and permit pleadings to be amended for including a prayer for relief on the basis of such events but this is ordinarily done to avoid multiplicity of proceedings or when the original relief claimed has, by reason of change in the circumstances, become inappropriate and not when the plaintiff's suit would be wholly displaced by the proposed amendment and a fresh suit by him would be so barred by limitation."<sup>58</sup>

(emphasis supplied)

Thus, where during the pendency of a suit for permanent injunction, the plaintiff is dispossessed by the defendant, the court can grant relief for restoration of possession also. Similarly, in a suit for partition by A against his brothers B and C, if C dies, A can claim one-half share instead of one-third. Again, where the proceedings under the Rent Control Act for permission to evict a tenant were pending, subsequent events affecting the right of the landlord to evict have been taken into account even in revision.<sup>59</sup> So also, pending an appeal in the Supreme Court, the defendant, Head of the Mutt, who nominated the plaintiff as his successor died, the Supreme Court took notice of that event, and declared the plaintiff as the successor of the defendant under the will alleged to have been revoked by the deceased defendant.<sup>60</sup>

But where the rights of the parties have already crystallised and the decision has reached finality, the concluded controversy cannot be

57. AIR 1966 Punj 374; ILR (1966) 2 Punj 125 (FB).

58. *Ibid.*, at pp. 378-79 (AIR). See also *Rameshwar v. Jot Ram*, (1976) 1 SCC 194 at p. 201 (SCC), at p. 52 (AIR); *Variety Emporium v. V.R.M. Mohd. Ibrahim*, (1985) 1 SCC 251 AIR 1985 SC 207, *Hasmat Rai v. Raghunath Prasad*, (1981) 3 SCC 103 AIR 1981 SC 1711; *Chandavarkar v. Ashalata*, (1986) 4 SCC 447. AIR 1987 SC 117, *Gulabhai v. Nalin Narsi Vohra*, (1991) 3 SCC 483 AIR 1991 SC 1760, *Ramesh Kumar v. Kesho Ram*, 1992 Supp (2) SCC 623 AIR 1992 SC 700, *Jai Prakash Gupta v. Riyaz Ahmad*, (2009) 10 SCC 197. In the last referred case, the Apex Court said, "(I)t is therefore a settled proposition of law that subsequent developments of fact or law which have a material bearing on the entitlement of the parties to relief or on aspects which bear on the moulding of the relief occur, the court, at any stage of the proceeding, is not precluded from taking a cautious cognizance of the subsequent developments of fact and law to mould the relief."

59. *Pasupuleti Venkateswarlu v. Motor & General Traders*, (1975) 1 SCC 770. See also *M.M. Quasim v. Manohar Lal*, (1981) 3 SCC 36 AIR 1981 SC 1113, *Gulabhai v. Nalin Narsi Vohra*, (1991) 3 SCC 483, *P.V. Papanna v. K. Padmanabhaiah*, (1994) 2 SCC 316 AIR 1994 SC 1577, *Super Forgings and Steels Sales (P) Ltd. v. Tiwaris, Kasurce*, (1995) 1 SCC 410, *Jai Prakash Gupta v. Riyaz Ahmad*, (2009) 10 SCC 197.

60. *Mahabir Thamburan v. Arunandi Thamburan*, (1974) 1 SCC 150 at pp. 166-67 AIR 1974 SC 199, *M.M. Quasim v. Manohar Lal*, (1981) 3 SCC 36.

reopened on the basis of subsequent events by divesting a party of the benefit of the right which accrued to him.<sup>61</sup>

#### (d) Admission of plaint: Rule 9

Rule 9 lays down the procedure when the plaint is admitted by the court. It provides for filing of copies of the plaint by the plaintiff and also requires him to pay requisite fees for the service of summons on the defendants within seven days.

#### (e) Return of plaint: Rules 10–10-B

Where at any stage of the suit, the court finds that it has no jurisdiction, either territorial or pecuniary or with regard to the subject-matter of the suit, it will return the plaint to be presented to the proper court in which the suit ought to have been filed.<sup>62</sup>

Rule 10-A prescribes the procedure to be followed by a court before the plaint is ordered to be returned to be presented to the proper court. It is inserted to obviate the necessity of serving the summons on the defendants where the return of plaint is made after the appearance of the defendants in the suit.<sup>63</sup> An appellate court can also return the plaint to be presented to the proper court.<sup>64</sup>

The judge returning the plaint should make endorsements on it regarding (i) the date of presentation; (ii) the date of return; (iii) the name of the party presenting it; and (iv) reasons for returning it.<sup>65</sup>

But at the stage of consideration of return of plaint, the averments in the plaint alone should be looked into. Moreover, the plaint should be read in a meaningful manner and as a whole so as to find out the real intention behind the suit.<sup>66</sup>

When the plaint is filed in the proper court, after getting it back from the wrong court, it cannot be said to be a continuation of the suit and the suit must be deemed to commence when a plaint is filed in the proper court.<sup>67</sup> The order returning the plaint is appealable.<sup>68</sup>

61. *Bhajan Lal v State of Punjab*, (1971) 1 SCC 34, *Rameshwar v. Jot Ram*, (1976) 1 SCC 194; AIR 1976 SC 49, *Syed Asadullah v. ADJ, Allahabad*, (1981) 3 SCC 483; AIR 1981 SC 1724; *PV Papanna v K Padmanabhaiah*, (1994) 2 SCC 316; AIR 1994 SC 1577.

62. R 10(1)

63. Law Commission's Fifty-fourth Report at p. 129; see also *Joginder v Bhatia*, (1997) 1 SCC 502.

64. R 10-B.

65. R 10(2)

66. *Moolji Jaitha and Co v Khandesh Spg and Wvg. Mills Co Ltd*, AIR 1950 FC 83, *T Arivandanam v TV Satyapal*, (1977) 4 SCC 467; AIR 1977 SC 2421, *Bequm Sabiha v Nawab Mohd. Mansur*, (2007) 4 SCC 343; AIR 2007 SC 1636

67. *Amar Chand v. Union of India*, (1973) 1 SCC 115; AIR 1973 SC 313, *Ran Ujare v Union of India*, (1999) 1 SCC 685; AIR 1999 SC 309, *Harjind Chhiman, n Modi (2) v DLF Universal Ltd*, (2006) 1 SCC 364.

68. Or. 43 R 1(a) See also *infra*, Pt III, Chap 4

### (f) Rejection of plaint: Rule 11

The plaint will be rejected in the following cases:<sup>69</sup>

#### (i) Where plaint does not disclose cause of action

If the plaint filed by the plaintiff does not disclose any cause of action, the court will reject it. But in order to reject the plaint on this ground, the court must look at the plaint and at nothing else.<sup>70</sup>

The power to reject a plaint on this ground should be exercised only if the court comes to the conclusion that even if all the allegations set out in the plaint are proved, the plaintiff would not be entitled to any relief. In that case, the court will reject the plaint without issuing summons to the defendants. The reading of the plaint should be meaningful and not formal.<sup>71</sup> But where the plaint does not disclose cause of action, clever drafting, ritual of repeating words or creation of an illusion cannot insert a cause of action in a plaint.<sup>72</sup>

Again, there is a difference between a plea that the plaint does not disclose a cause of action and a plea that there is no cause of action for instituting a suit. For determining whether the plaint discloses the cause of action or not, averments in the plaint alone are relevant and material.<sup>73</sup>

Finally, the plaint can be rejected as a whole if it does not disclose the cause of action. A part of it cannot be rejected.<sup>74</sup>

#### (ii) Where relief claimed is undervalued

Where the relief claimed by the plaintiff is undervalued and the valuation is not corrected within the time fixed or extended by the court, the plaint will be rejected.

In considering the question whether the suit is properly valued or not, the court must confine its attention to the plaint only and should

69 R 11.

70 *Abdulla Bin Ali v Galappa*, (1985) 2 SCC 54 AIR 1985 SC 577, *Commercial Aviation & Travel Co. v Vinla Pannatal*, (1988) 3 SCC 423 AIR 1988 SC 1636, *Bezum Sahiba v Nawab Mohd. Mansur*, (2007) 4 SCC 343.

71 *Ibid*, see also *I. Arundhaniam v TV. Satupal*, (1977) 4 SCC 467 at p 470.

72 *Ibid*, see also *ITC Ltd v Debits Recovery Appellate Tribunal*, (1992) 2 SCC 70 AIR 1992 SC 634, *Church of North India v Lavabhui*, (2005) 10 SCC 760 AIR 2005 SC 2544, *Haridesh Ores (P) Ltd v Hede and Co.* (2007) 5 SCC 614.

73 *State of Orissa v Klockner & Co.* (1990) 8 SCC 377 AIR 1990 SC 2140, *Ravilal & Co. v Ganes Property* (1998) 7 SCC 184 AIR 1998 SC 3085, *Bezum Sahiba v Nawab Mohd. Mansur* (2007) 4 SCC 343.

74 *Rajpal v Nishanath Sengh*, (1982) 3 SCC 487 at pp 499-500 AIR 1982 SC 1559 at pp 1560-61, *Church of North India v Lavabhui* (2005) 10 SCC 760.

not look at the other circumstances which may subsequently influence the judgment of the court as to the true value of the relief prayed for.<sup>75</sup>

**(iii) Where plaint is insufficiently stamped**

Sometimes the relief claimed by the plaintiff is properly valued, but the plaint is written upon a paper insufficiently stamped and the plaintiff fails to pay the requisite court fees within the time fixed or extended by the court. In that case, the plaint will be rejected. However, if the requisite court fee is paid within the time extended by the court, the suit or appeal must be treated as instituted from the date of presentation of plaint or memorandum of appeal for the purpose of limitation as well as payment of court fee.<sup>76</sup>

If the plaintiff cannot pay the court fees, he may apply to continue the suit as an indigent person.<sup>77</sup>

**(iv) Where suit is barred by law**

Where the suit appears from the statements in the plaint to be barred by any law, the court will reject the plaint.

For instance, where in a suit against the government, the plaint does not state that a "notice" as required by Section 80 of the Code has been given, the plaint will be rejected under this clause.<sup>78</sup> But where waiver of such notice is pleaded, the court cannot reject the plaint without giving the plaintiff an opportunity to establish that fact.<sup>79</sup> Likewise, if the plaint itself shows that the claim is barred by limitation, the plaint can be rejected.<sup>80</sup> But if the question of limitation is connected with the merits of the case, the matter requires to be decided along with other issues.<sup>81</sup>

75. *Meenakshisundaram v. Venkatachalam*, (1980) 1 SCC 616 AIR 1979 SC 989; *Tara Devi v. Sri Thakur Radha Krishna Maharaj*, (1987) 4 SCC 69: AIR 1987 SC 2085.

76. *Mannan Lal v. Chhotaka Bibi*, (1970) 1 SCC 769 at pp. 776-77: AIR 1971 SC 1374.

77. Or. 33. See *infra*, Chap. 16.

78. *Bhagchand v. Secy. of State*, (1926-27) 54 IA 338: AIR 1927 PC 176, *Beohar Rajendra Sinha v. State of M.P.*, (1969) 1 SCC 796: AIR 1969 SC 1256, *Tej Kiran v. N. Sanjiva Reddy*, (1970) 2 SCC 272 AIR 1970 SC 1573. For detailed discussion, see *infra*, Chap. 16.

79. *B.L. Chopra v. Punjab State*, AIR 1961 Punj 150; *Lakshmi Narain v. Union of India*, AIR 1962 Pat 64, *Beohar Rajendra Sinha v. State of M.P.*, (1969) 1 SCC 796: AIR 1969 SC 1256; *Tej Kiran v. N. Sanjiva Reddy*, (1970) 2 SCC 272 AIR 1970 SC 1573; *Ebrahimkhani v. State of Maharashtra*, AIR 1975 Bom 13.

80. *Ibid*; see also *Gangappa Gurupadappa v. Rachawwa*, (1970) 3 SCC 716: AIR 1971 SC 442.

81. *Arjan Singh v. Union of India*, AIR 1987 Del 165.

**(v) Where plaint is not in duplicate**

The plaint has to be filed in duplicate.<sup>82</sup> If the said requirement is not complied with the plaint will be rejected.<sup>83</sup>

**(vi) Where there is non-compliance with statutory provisions**

Where the plaintiff fails to comply with the provisions of Rule 9, the plaint will be rejected.<sup>84</sup>

**(vii) Other grounds**

The grounds for rejection of plaint specified in Rule 11 of Order 7 are not exhaustive. On other relevant grounds also a plaint can be rejected. Thus, if the plaint is signed by a person not authorised by the plaintiff and the defect is not cured within the time granted by the court, the plaint can be rejected.<sup>85</sup> Likewise, where the plaint is found to be vexatious and meritless, not disclosing a clear right to sue, the court may reject the plaint under this rule.<sup>86</sup>

**(viii) Procedure on rejection of plaint: Rule 12**

Where a plaint is rejected by a court, the judge will pass an order to that effect and will record reasons for such rejection.<sup>87</sup>

**(ix) Effect of rejection of plaint: Rule 13**

If the plaint is rejected on any of the above grounds, the plaintiff is not thereby precluded from presenting a fresh plaint in respect of the same cause of action.<sup>88</sup>

**(x) Appeal**

An order rejecting a plaint is a deemed "decree" within the meaning of Section 2(2) of the Code, and, therefore, is appealable.<sup>89</sup>

**(g) Documents relied on in plaint: Rules 14-17**

Rules 14 to 17 deal with the production of documents by the plaintiff. Rule 14 enjoins the plaintiff to produce at the time of the presentation of

82 Or 4 R 1(1)

83 Or 7 R 11(e)

84 Or 7 R 11(f)

85 *Radakishen v Wali Mohammed*, AIR 1956 Hyd 133 ILR 1956 Hyd 514.

86. *T Arivandanam v. T V Satyapal*, (1977) 4 SCC 467 AIR 1977 SC 2421. *Mayar H K Ltd v Owners & Parties, Vessel M V Fortune Express*, (2006) 3 SCC 100 AIR 2006 SC 1828

87 R 12.

88 R 13

89 S 96 See *infra*, Pt III

a plaint copies of all documents on which he sues or seeks to rely. It also provides for the consequences of non-production of documents. It lays down that a document which ought to be produced in the court by the plaintiff when the plaint is presented or to be entered in the list to be added or annexed to the plaint, and is not produced or entered accordingly, shall not, without the leave of the court, be received in evidence on his behalf at the hearing of the suit.

The object underlying Rule 14 is to exclude the production of documents of a doubtful nature at a later stage.<sup>90</sup> The court has wide discretion to allow or disallow production of documents at a later stage having regard to the facts and circumstances of each case.<sup>91</sup> This provision, however, does not apply to the following documents:

- (i) Documents reserved for the purpose of cross-examination of the defendant's witnesses; or
- (ii) Documents handed over to a witness merely to refresh his memory.<sup>92</sup>

### 3. AGENTS AND PLEADERS: ORDER 3

#### (a) Appearance of parties: Rule 1

Generally any appearance, application or act in or to any court may be made or done (i) by a party in person; or (ii) by his agent; or (iii) by a pleader appearing, applying or acting on his behalf. No doubt, a court can direct any party to appear in person.<sup>93</sup> Except for good reasons, however, a court will not direct the party to appear in person.<sup>94</sup> But once such a direction is issued by a court and even then the party fails to appear, the court may dismiss the suit or proceed *ex parte*.<sup>95</sup>

The primary object of Rule 1 is to facilitate the proceedings before the court, to afford an opportunity to the party and to enable him to perform certain acts through recognized agent or pleader which otherwise he would have to perform.<sup>96</sup>

90. *Sudhir Kumar v. Bank of India*, AIR 1991 Pat 267; *Ramachandra Das v. Hiralal Modi*, AIR 1978 Ori 172.

91. *Kanda v. Waghu*, (1949-50) 77 IA 15; AIR 1950 PC 68; *Gopika Raman Roy v. Atal Singh*, (1928-29) 56 IA 119; AIR 1929 PC 99; *Budhey Ram v. Hira Lal*, AIR 1953 HP 52.

92. R 14(4).

93. Or 3 R. 1, see also *Jagraj Singh v. Birpal Kaur*, (2007) 2 SCC 564.

94. *Sarla Rani v. Bhushanlal*, AIR 1976 J&K 12; *Pandu v. Hira*, AIR 1936 Nag 85.

95. Or 9 R. 12, see also *Jagraj Singh v. Birpal Kaur*, (2007) 2 SCC 564.

96. *Nadella Satyanarayana v. Yamanoori Venkata Subbiah*, AIR 1957 AP 172 (FB). ILR 1957 AP 1 (FB).

## (b) Recognized agents: Rule 2

### (i) Agent: Meaning

An agent is a person having express or implied authority to act on behalf of another person, called principal.

Recognized agent is a person allowed to speak or conduct proceedings in a court of law.<sup>97</sup>

### (ii) Recognized agents under CPC

The following persons have been considered as recognized agents by the Code:

- (i) Persons holding power of attorney;<sup>98</sup>
- (ii) Persons carrying on trade or business for parties;<sup>99</sup>
- (iii) Persons specially appointed by the government to prosecute or defend on behalf of foreign rulers;<sup>100</sup> and
- (iv) Persons authorized to act for Government.<sup>101</sup>

## (c) Pleadings: Rule 4

### (i) Pleading: Definition

"Pleading" is defined in the Code as "any person entitled to appear and plead for another in court and includes an advocate, a vakil and an attorney of a High Court".<sup>102</sup>

### (ii) Appointment of pleader: Rule 4

Rule 4 prescribes the manner of the appointment of a pleader and also the limit up to which such appointment remains in force. It provides that a pleader can be appointed by a document in writing, known as *vakalatnama* or *vakalatpatra*, signed by the party or by his recognized agent or by some other person, duly authorised by him. Every such appointment shall be filed in court and deemed to be in force until the determination of all proceedings in the suit; or until determined by the client or the pleader, or until the client or pleader dies; or until the duration for which he is engaged is over.<sup>103</sup>

### (iii) Status of pleader

The legal profession is essentially a service-oriented profession. The ancestor of today's lawyer was a spokesman who rendered service to

97 *Chamber's 20th Century Dictionary* (1992) at p. 1080

98 Or 1 R 2

99 *Ibid*

100 S 85

101 Or 27 R 2

102 S 2(15)

103 R 4

needy members of society without regard to remuneration. The relationship between a lawyer and his client is of trust and confidence. Being a responsible officer of the court, a lawyer owes responsible conduct not only to his client but also to the other side and to the court and to society at large. He is essentially an adviser to his client and is rightly called a "counsel" in some jurisdictions. *He demeans himself if he acts merely as a mouthpiece of his client.*<sup>104</sup> (emphasis supplied)

**(iv) Authority of pleader**

A pleader stands on the same footing in regard to his authority to act on behalf of his clients.<sup>105</sup> There is inherent in the position of counsel an implied authority to do all that is expedient, proper and necessary for the conduct of the suit and the settlement of disputes.<sup>106</sup> This power, however, must be exercised *bona fide* and for the benefit of his client.<sup>107</sup> Secondly, power is one thing and prudence is another and indeed the latter sometimes bears upon the former.<sup>108</sup> The lawyer must be above board, especially if he is to agree to an adverse verdict.<sup>109</sup> It is prudent and proper to consult his client and take his consent if there is time and opportunity.<sup>110</sup> He should not act on implied authority except when warranted by exigency of circumstances and a signature of the party cannot be obtained without undue delay. In these days of easier and quicker communication, such contingency may seldom arise.<sup>111</sup> Again, ordinarily when a junior and senior appear in the case, it would be risky on the part of the junior to report a compromise without consulting his senior.<sup>112</sup>

104. *State of U.P. v. U.P. State Law Officers Assn.*, (1994) 2 SCC 204 at p. 216: AIR 1994 SC 1654. See also *Vinay Chandra Mishra, Re*, (1995) 2 SCC 584: AIR 1995 SC 2348; *Ministry of Information & Broadcasting, Re*, (1995) 3 SCC 619.

105. *Jamilabai Abdul Kadar v. Shankarlal*, (1975) 2 SCC 609 at p. 615: AIR 1975 SC 2202 at pp. 2205-06.

106. *Ibid*, at p. 618 (SCC): at p. 2207 (AIR). See also *Laxmidas v. Savitabai*, AIR 1956 Bom 54; *Surendra Shankar v. Laxman Shankar*, AIR 1960 Bom 20; *Manoharbahal Colliery v. K N Mishra*, (1975) 2 SCC 244: AIR 1975 SC 1632.

107. *Ibid*, at p. 623 (SCC). at p. 2210 (AIR).

108. *Ibid*, at pp. 621-22 (SCC). at p. 2210 (AIR).

109. *Ibid*, at p. 624 (SCC). at p. 2211 (AIR). See also *Manoharbahal Colliery v. K.N. Mishra*, (1975) 2 SCC 244: AIR 1975 SC 1632; *State of U.P. v. U.P. State Law Officers Assn.*, (1994) 2 SCC 204: (1994) 26 ATC 906, *Vinay Chandra Mishra, In re*, (1995) 2 SCC 584. AIR 1995 SC 2348; *Ministry of Information & Broadcasting, Re*, (1995) 3 SCC 619.

110. *Ibid*, at p. 623 (SCC): at pp. 2210-11 (AIR).

111. *Byram Pestonji v. Union Bank of India*, (1992) 1 SCC 31 at pp. 46-47. AIR 1991 SC 2234 at p. 2244.

112. *Jamilabai Abdul Kadar v. Shankarlal*, (1975) 2 SCC 609 at p. 624 (SCC). at p. 2211 (AIR)

## (v) Duties of pleader

Lawyers are custodians of civilisation. They have to discharge their duties with dignity, decorum and discipline.<sup>113</sup> They are not mere agents of their clients but are officers of the court and they are expected to assist in the administration of justice. As it is said, a counsel has a tripartite relationship: one with the public, another with the court and the third with his client. That is a unique feature.<sup>114</sup> Other professions or callings may include one or two of these relationships but no other has the triple duty. Counsel's duty to the public is unique in that he has to accept all work from all clients in courts in which he holds himself out as practising, however unattractive the case or his client.<sup>115</sup> A counsel has the duty and right to speak freely and independently without fear of authority, without fear of the judges and also without fear of a stab in the back from his own client. *To some extent, he is a Minister of Justice.*<sup>116</sup>

(emphasis supplied)

A counsel has no right to go on strike or to remain absent from court when the case of his client comes up for hearing. He is duty-bound to attend the case in court or to make an alternative arrangement. The mere fact that he was busy in some other court is not a good and sufficient ground for his non-appearance in the court when his case is called for hearing. Such absence is not only unfair to his client but is also unfair and discourteous to the court and should be severely discountenanced.<sup>117</sup>

Lord Atkin rightly states, "The advocate is to conduct the cause of his client to the utmost of his skill and understanding. He must in the interests of his client be in the position, hour by hour, almost minute by minute, to advance his argument, to withdraw that; he must make the final decision whether the evidence is to be given or not on any

113. *Hargovind Dayal v. G.N. Verma*, (1977) 1 SCC 744 at p. 746: AIR 1977 SC 1334 at p. 1335.

114. *Chengan Souri Nayakam v A N. Menon*, AIR 1968 Ker 213 at p. 216 (FB) (per Mathew, J.); see also *Jamilabai Abdul Kadar v. Shankarlal*, (1975) 2 SCC 609, *Byram Pestonji v Union Bank of India*, (1992) 1 SCC 31.

115. Per Mathew, J. in *Chengan Souri Nayakam v A N. Menon*, AIR 1968 Ker 213 at p. 216 (FB). See also *Jamilabai Abdul Kadar v. Shankarlal*, (1975) 2 SCC 609, *Byram Pestonji v Union Bank of India*, (1992) 1 SCC 31.

116. Per Lord Denning in *Rondel v. Worsley*, (1969) 1 AC 191 (1967) 1 QB 443 at p. 502 (1967) 3 WLR 1666 (1967) 3 All ER 993 (HL). See also *Jamilabai Abdul Kadar v Shankarlal*, (1975) 2 SCC 609, *State of Punjab v Satya Pal*, AIR 1969 SC 903 at p. 915, *T Arivandanam v TV Satyapal*, (1977) 4 SCC 467 at pp. 469-70, AIR 1977 SC 2421 at p. 2423, *K. Sankaranarayana v Mysore Fertiliser Co.*, AIR 1979 Ker 167.

117. *Sita Bai v Vidhyawati*, AIR 1972 MP 198 at p. 199, *Rafiq v Munshilal* (1981) 2 SCC 788, AIR 1981 SC 1400, *Goswami Krishna v Dhan Prakash*, (1981) 4 SCC 524, *Lachi Tewari v Director of Land Records*, 1984 Supp SCC 431, AIR 1984 SC 41, *Sahil Dutta v T M & M C (P) Ltd.*, (1993) 2 SCC 185, *Mahabir Prasad v Jacks Aviation (P) Ltd.*, (1999) 1 SCC 37, AIR 1999 SC 287, see also *infra*, "Strike by lawyers".

question of fact; skill in advocacy is largely the result of discrimination ... *often the decision must be made at once.*"<sup>118</sup> (emphasis supplied) There are a few black sheep in every profession, nay, in every walk of life. But few as they are, they tarnish the fair name of age-old institutions.<sup>119</sup> The Bar must sternly screen to extirpate the black sheep among them, for Caesar's wife must be above suspicion, if the profession is to command the confidence of the community and the court.<sup>120</sup> It is also the duty of lawyers to protect the dignity and decorum of the judiciary. If lawyers fail in their duty the faith of the people in the judiciary will be undermined to a large extent.<sup>121</sup>

#### (vi) Responsibilities of pleader

No one expects a lawyer to be subservient to the Court while presenting the case of his client and not to put forward his arguments merely because the court is against him. On the contrary, that is the moment when he is expected to put forth his best efforts to persuade the Court. But if the lawyer finds, in spite of his efforts, that the Court is against him, he should not be discourteous to the Court nor should he use disrespectful or derogatory language. *The lawyer is not entitled to indulge in unbecoming conduct either by showing his temper or using unbecoming language.*<sup>122</sup> (emphasis supplied)

The legal profession is a solemn and serious occupation. It is a noble calling and all those who belong to it are its honourable members. Although the entry to the profession can be had by acquiring merely the qualification of technical competence, the honour as a professional has to be maintained by its members by their exemplary conduct both in and outside the Court. The legal profession is different from other professions in that what the lawyers do, affects not only an individual but the administration of justice which is the foundation of civilised society. *Both as a leading member of the intelligentsia of the society and as a responsible citizen, the lawyer has to conduct himself as a model for others both in his professional and in his private and public life. The society has a right to expect of him such ideal behaviour.*<sup>123</sup> (emphasis supplied)

118. *Sourendra Nath Mitra v. Tarubala Dasi*, (1929-30) 57 IA 133; AIR 1930 PC 158.

119. *Per Chandrachud, C.J.* in *Satyendra Narain v. Ram Nath*, (1984) 4 SCC 217 at p. 219; AIR 1984 SC 1755 at p. 1756.

120. *Per Krishna Iyer, J.* in *Jamilabai Abdul Kadar v. Shankarlal*, (1975) 2 SCC 609 at p. 623; at p. 2211 (AIR).

121. *Per Ray, C.J.* in *T. Arivandanam v. T.V. Satyapal*, (1977) 4 SCC 467 at pp. 470-71. AIR 1977 SC 2421 at p. 2423.

122. *Vinay Chandra Mishra, In re*, (1995) 2 SCC 584 at p. 614; AIR 1995 SC 2348.

123. *Ministry of Information & Broadcasting, Re*, (1995) 3 SCC 619 at p. 634.

**(vii) Strike by pleaders**

A lawyer or pleader cannot go on strike nor boycott a court. It is the duty of every lawyer to attend trial even if it may go on for a prolonged period. He cannot refuse to attend the court on the ground that the Bar Association or Bar Council has given a call for strike or boycott of court. A court also cannot adjourn matters merely because lawyers are on strike. If lawyers resort to strike, they are answerable for consequences. Only in "the rarest of rare cases", involving dignity, integrity and independence of the Bar or the Bench, abstention of court work may not be taken seriously. But it is for the court to decide whether the issue calls for such action. Normally, in such cases, the President of the Bar should first consult the Chief Justice or the District Judge whose decision would be final.<sup>124</sup>

**(viii) Appearance by proxy**

It is a recognized practice in almost all courts that counsel for parties are allowed to be represented by other counsel. Representations made by them are usually taken as representations by counsel on record unless it is shown to be otherwise.<sup>125</sup>

**(ix) Advocates lien**

A litigant is free to change his advocate if he feels that the advocate engaged by him does not act properly or for any other reason. In such cases, the litigant must pay professional fees of the advocate engaged. But the advocate has no lien on client's papers. He cannot refuse to return case-papers till his fee is paid. Case files cannot be equated with "goods bailed" under the Contract Act.<sup>126</sup>

**(x) Senior advocates**

The Chief Justice of India and Judges of the Supreme Court and Chief Justices of High Courts and Judges of High Courts may designate an advocate as Senior Advocate if in their opinion, by virtue of his ability, standing at the Bar, special knowledge or experience in law, he deserves such distinction.

124. *Ex Capt Harish Uppal v. Union of India*, (2003) 2 SCC 45 AIR 2003 SC 739 *Supreme Court Employees' Welfare Assn v Union of India*, (1989) 4 SCC 187, *Indian Council of Legal Aid & Advice v Bar Council of India*, (1995) 1 SCC 732. AIR 1995 SC 691. *C Ravichandran v A M Bhattacharjee* (1995) 5 SCC 457

125. *Jayant Madhav v Garware Wall Ropes Ltd*, AIR 1997 Bom 126 (1997) 1 Mah LJ 261 (1997) 2 Mah LR 255; (1997) 2 Bom CR 427

126. *R D Saxena v Bairam Prasad Sharma* (2000) 7 SCC 264 AIR 2000 SC 2912, *C S Venkatasubramaniam v SBI*, (1997) 1 SCC 254 AIR 1997 SC 2329.

(d) **Service of process: Rules 3, 5-6**

A process served on the recognized agent or a pleader of the party or left at the office or residence of the pleader will be considered as valid and proper.<sup>127</sup>

4. SUMMONS: SECTIONS 27-29; ORDER 5

(a) **Summons: Meaning**

When the plaintiff files a suit, the defendant has to be informed that the suit has been filed against him, and that he is required to appear in the court to defend it. The intimation which is sent to the defendant by the court is technically known as "summons".

Though the said expression (summons) has not been defined in the Code, according to the dictionary meaning,<sup>128</sup> "A summons is a document issued from the office of a court of justice, calling upon the person to whom it is directed to attend before a judge or officer of the court for a certain purpose."

(b) **Object of issuing summons**

When a suit is filed by the plaintiff against the defendant and a relief is claimed, the defendant must be given an opportunity as to what he has to say against the prayer made by the plaintiff. This is in consonance with the principle of natural justice as no one can be condemned unheard (*audi alteram partem*)<sup>129</sup>. If the defendant is not served with the summons, a decree passed against him will not bind him.

(c) **Essentials of summons: Rules 1-2**

Every summons shall be signed by the judge or such officer appointed by him and shall be sealed with the seal of the court<sup>130</sup>, and must be accompanied by a plaint.<sup>131</sup>

(d) **Form of summons**

Every summons should be in the Forms prescribed in Appendix B to the (First) Schedule of the Code.

127. Rr. 3, 5, 6, See also *Nilkantha Sidramappa v. Kashinath Somanna*, AIR 1962 SC 666 at p. 668; (1962) 2 SCR 551.

128. Earl Jowitt, *The Dictionary of English Law* (1972) at p. 1700; see also *Concise Oxford English Dictionary* (2002) at p. 1435.

129. For detailed discussion of *audi alteram partem*, see, *Authors' Lectures on Administrative Law* (2012) Lecture VI.

130. Or. 5 R. 1(3).

131. R. 2.

**(e) Summons to defendant: Section 27; Order 5 Rule 1**

Order 5 deals with summons to a defendant while Order 16 deals with summons to witnesses.<sup>132</sup> When a suit has been duly filed by presentation of a plaint, the court must issue summons to the defendant calling upon him to appear and answer the claim of the plaintiff by filing a written statement within thirty days from the date of service of summons.<sup>133</sup> No summons, however, will be issued by the court if, at the time of presentation of a plaint, the defendant is present and admits the plaintiff's claim.<sup>134</sup>

**(f) Appearance in person: Rule 3**

A defendant to whom a summons has been issued, may appear (1) in person; or (2) by a pleader duly instructed and able to answer all material questions relating to the suit; or (3) by a pleader accompanied by some person able to answer all such questions.<sup>135</sup> The court, however, may order the defendant or plaintiff to appear in person.<sup>136</sup>

**(g) Exemption from appearance in person:  
Sections 132-33; Rule 4**

No party shall be ordered to appear in person:

- (a) unless he resides (a) within the local limits of the court's ordinary original jurisdiction; or (b) outside such limits, but at a place less than (i) 50 miles; or (ii) 200 miles (where public conveyance is available) from the courthouse;<sup>137</sup> or
- (b) who is a woman not appearing in public;<sup>138</sup> or
- (c) who is entitled to exemption under the Code.<sup>139</sup>

**(h) Contents of summons: Rules 5-8**

The summons must contain a direction whether the date fixed is for settlement of issues only or for final disposal of the suit.<sup>140</sup> In the latter case, the defendant should be directed to produce his witnesses.<sup>141</sup> The court must give sufficient time to the defendant to enable him to appear and answer the claim of the plaintiff on the day fixed.<sup>142</sup> The summons should also contain an order to the defendant to produce all documents

132 For "Summons to witnesses", see *infra*, Chap. 14

133 S. 27 Or. 5 R. 1(1)

136 R. 3

139 S. 133

142 R. 6

134 First Proviso to R. 1(1).

137 R. 4

140 R. 5

135 R. 1(2)

138 S. 132

141 R. 8

or copies thereof in his possession or power upon which he intends to rely on in support of his case.<sup>143</sup>

### (i) Mode of service of summons: Rules 9-30

The service of summons is of primary importance as it is a fundamental rule of the law of procedure that a party must have a fair and reasonable notice of the legal proceedings initiated against him so that he can defend himself. The problem of service of summons is one of the major causes of delay in the progress of the suit. It is common knowledge that defendants try to avoid service of summons. The Law Commission considered the problem and it was felt that certain amendments were necessary in that direction and a defendant can be served by a plaintiff or through modern means of communication. Accordingly, amendments were made in the Code in 1976, 1999 and 2002.<sup>144</sup>

The Code prescribes five principal modes of serving a summons to a defendant:

#### (1) Personal or direct service: Rules 10-16, 18

Rules 10 to 16 and 18 deal with personal or direct service of summons upon the defendant. This is an ordinary mode of service of summons. Here the following principles must be remembered:

- (i) Wherever it is practicable, the summons must be served to the defendant in person or to his authorised agent.<sup>145</sup>
- (ii) Where the defendant is absent from his residence at the time of service of summons and there is no likelihood of him being found at his residence within a reasonable time and he has no authorised agent, the summons may be served on any adult male or female member of the defendant's family residing with him.<sup>146</sup>

A servant, however, cannot be said to be a family member.<sup>147</sup>
- (iii) In a suit relating to any business or work against a person, not residing within the territorial jurisdiction of the court issuing the summons, it may be served to the manager or agent carrying on such business or work.<sup>148</sup>
- (iv) In a suit for immovable property, if the service of summons cannot be made on the defendant personally and the defendant has no authorised agent, the service may be made on any agent of the defendant in charge of the property.<sup>149</sup>

143. R. 7

144. *Salem Advocate Bar Assn. (II) v. Union of India*, (2005) 6 SCC 344: AIR 2005 SC 3353.

145. R. 12.

146. R. 15.

147. Expln. to R. 15.

148. R. 13.

149. R. 14.

- (v) Where there are two or more defendants, service of summons should be made on each defendant.<sup>150</sup>

In all the above cases, service of summons should be made by delivering or tendering a copy thereof.<sup>151</sup> Where the serving officer delivers or tenders a copy of summons to the defendant personally or to his agent or other person on his behalf, the person to whom the copy is delivered or tendered must make an acknowledgment of service of summons.<sup>152</sup> The serving officer, thereafter, must make an endorsement on the original summons stating the time and manner of service thereof and the name and address of the person, if any, identifying the person served and witnessing the delivery or tender of summons.<sup>153</sup>

## (2) Service by court: Rule 9

Summons to defendant residing within the jurisdiction of the court shall be served through court officer or approved courier service.<sup>154</sup> Summons can also be served by registered post, speed post, acknowledgment due (RPAD), courier service, fax, message, e-mail service or by any other permissible means of transmission.<sup>155</sup> Where the defendant is residing outside the jurisdiction of the court, the summons shall be served through an officer of the court within whose jurisdiction the defendant resides.<sup>156</sup> The court shall treat refusal of acceptance as a valid service.<sup>157</sup> Where summons is properly addressed, prepaid and duly sent by registered post acknowledgment due (RPAD) there will be a presumption of valid service of summons even in the absence of an acknowledgement slip.<sup>158</sup>

Though there can be no objection in giving an opportunity to the plaintiff to serve summons on the defendant, there should be sufficient safeguards to avoid false report of service of summons. High Courts should make appropriate rules or issue practice directions to ensure that the provisions are properly implemented and there is no abuse of process of law.<sup>159</sup>

## (3) Service by plaintiff: Rule 9-A

The court may also permit service of summons by the plaintiff in addition to service of summons by the court.<sup>160</sup>

150. R 11

153. R 18

156. R 9(4)

159. *Salem Advocate Bar Assn (2) v Union of India*, (2005) 6 SCC 344

160. R 9-A, see also *Salem Advocate Bar Assn (2) v Union of India*, (2005) 6 SCC 344

151. R 10

154. R 9(1), (2)

157. R 9(5)

152. R 16

155. R 9(3)

158. Proviso to R 9(5)

#### (4) Substituted service: Rules 17, 19-20

"Substituted service" means the service of summons by a mode which is substituted for the ordinary mode of service of summons.

There are two modes of substituted service. They are:

(a) (i) where the defendant or his agent refuses to sign the acknowledgment; or (ii) where the serving officer, after due and reasonable diligence, cannot find the defendant who is absent from his residence at the time of service of summons and there is no likelihood of him being found at his residence within a reasonable time and there is no authorised agent nor any other person on whom service can be made, the service of summons can be made by affixing a copy on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain. The serving officer shall then return the original to the court from which it was issued with a report endorsed thereon stating the fact about affixing the copy, the circumstances under which he did so, and the name and address of the person, if any, by whom the house was identified and in whose presence the copy was affixed.<sup>161</sup> If the court is satisfied, either on the affidavit of the serving officer or on his examination on oath, that the summons has been duly served, it may either declare that the summons has been duly served or may make further enquiry in the matter as it thinks fit.<sup>162</sup>

Thus, in the second mode of service of summons as provided by Rule 17, the service is effected *without an order of the court* by affixing a copy of the summons on the house of the defendant and therefore the *declaration by the court* about the due service of the summons is essential.<sup>163</sup> If the provisions of Rule 19 have not been complied with, the service of summons cannot be said to be in accordance with law.<sup>164</sup>

(b) Where the court is satisfied that there is reason to believe that the defendant avoids service or for any other reason the summons cannot be served in the ordinary way, the service may be effected in the following manner:

(i) by affixing a copy of the summons in some conspicuous place in the courthouse; and also upon some conspicuous part of the house in which the defendant is known to have last resided, carried on business or personally worked for gain; or

(ii) in such manner as the court thinks fit.<sup>165</sup>

161. R. 17.

162. R. 19.

163. *Parasurama Odayar v. Appadurai Chetty*, AIR 1970 Mad 271 (FB); *CIT v. Thayaballi Mulla Jeevaji*, (1968) 1 SCJ 91, *Laxmibai v. Keshrimal Jain*, AIR 1995 MP 178.

164. *State of J&K v. Haji Wali Mohammed*, (1972) 2 SCC 402 at p. 408-09. AIR 1972 SC 2538 at p. 2543.

165. R. 20(1).

It, however, must be remembered that this is not a regular mode of service and hence, it should not normally be allowed and can be effected only as a last resort.<sup>166</sup>

Before more than a century ago, in *Cohen v. Nursing Dass*<sup>167</sup>, it was stated, "It is true that you may go to a man's house and not find him, but that is not attempting to find him. You should go to his house, make enquiries and, if necessary, follow him. You should make enquiries to find out when he is likely to be at home, and go to the house at a time when he can be found. Before service like this can be effected it must be shown that proper efforts have been made to find out when and where the defendant is likely to be found—not as seems to be done in this country, to go to his house in a perfunctory way, and because he has not been found there, to affix a copy of the summons on the outer door of his house."

Where the court orders service by an advertisement in a newspaper, the newspaper should be a daily newspaper circulating in the locality in which the defendant is last known to have actually or voluntarily resided, carried on business or personally worked for gain.<sup>168</sup> Such service is an effective service, even if the defendant is not the subscriber of the newspaper or is not reading it.<sup>169</sup>

Under Rule 20, the service of summons is effected *by the order of the court* only after the court is satisfied that the defendant avoids service of summons or it cannot be served in the ordinary way.<sup>170</sup> Such satisfaction must be recorded by the court in writing.<sup>171</sup> Substituted service is as effective as personal service.<sup>172</sup> The court must fix a time for the appearance of the defendant and give him a reasonable time to appear before the court.<sup>173</sup>

### (5) Service by post

When an acknowledgment purporting to be signed by the defendant or his agent is received by the court, or the defendant or his agent

166. *Yallawva v. Shantavva*, (1997) 11 SCC 159; AIR 1997 SC 35; *CIT v. Thayaballi Mulla Jeevaji*, (1968) 1 SCJ 91, *Parasurama Odayar v. Appadurai Chetty*, AIR 1970 Mad 271, *Bondla Ramlingam v. Shiv Balasiddah*, AIR 1979 AP 180, *Dina Nath v. Upendra Nandan Das*, AIR 1924 Cal 1004, *G. Shanmukhi v. Utakur Venkatarami Reddi*, AIR 1957 AP 1 (FB), *Basant Singh v. Roman Catholic Mission*, (2002) 7 SCC 531

167. *Cohen v. Nursing Dass*, ILR (1892) 19 Cal 201, see also *Kuldip Rai v. Sharan Singh*, AIR 1989 P&H 319.

168. R 20(1-A)

169. *Sunil Poddar v. Union Bank of India*, (2008) 2 SCC 326

170. *G. Shanmukhi v. Utakur Venkatarami Reddi*, AIR 1957 AP 1 (FB), *Ram August Tewari v. Bindheshwari Tewari*, AIR 1972 Pat 142

171. *Kuldip Rai v. Sharan Singh*, AIR 1989 P&H 319.

172. R 20(2)

173. R 20(3), see also *S V P Chockalingam Chettiar v. C. Rajarathnam*, AIR 1964 Mad 415

refused to take delivery of summons when tendered to him, the court issuing the summons shall declare that the summons had been duly served on the defendant.<sup>174</sup> The same principle applies in a case where the summons was properly addressed, prepaid and duly sent by registered post, acknowledgment due; and the acknowledgment is lost or not received by the court within thirty days from the date of issue of the summons. Where the summons sent by registered post is returned with an endorsement "refused", the burden is on the defendant to prove that the endorsement is false.<sup>175</sup>

### (j) Refusal of summons

Where the defendant refuses to accept summons. He is deemed to have been served. Similarly, where an acknowledgment or receipt purported to have been signed by the defendant (or his agent) is received by the court that the defendant (or his agent) has refused to take the delivery of summons, the court will proceed treating the defendant as served.<sup>176</sup>

### (k) Objection as to service of summons

An objection as to service of summons should be raised at the earliest possible opportunity. If it is not taken at that stage, it is deemed to have been waived.<sup>177</sup>

### (l) Service of summons in special cases: Rules 21-30

(i) Where the defendant resides within the jurisdiction of another court or in another State, the summons may be sent to the court where he resides. Such court will serve summons on the defendant.<sup>178</sup>

(ii) Service of foreign summons may be effected by sending them to the courts in the territories in which the provisions of this Code apply and served as if they were summonses issued by such courts.<sup>179</sup>

174. *Puwada Venkateswara v. Chidamana Venkata*, (1976) 2 SCC 409; AIR 1976 SC 869; *Jagdish Singh v. Natthu Singh*, (1992) 1 SCC 647; AIR 1992 SC 1604; *Basant Singh v. Roman Catholic Mission*, (2002) 7 SCC 531; *Bhagwan Gold and Silver Store v. H.I.M. Works*, AIR 1970 P&H 393; *Suresh Chandra v. Gosaidas Pal*, AIR 1976 Cal 87; *Meghji Kanji v. Kundanmal*, AIR 1968 Bom 387, *Nawabzada Mohd. Ishaq Khan v. Delhi Iron & Steel Co. Ltd.*, AIR 1979 All 366; *Adambhai v. Ramdas*, AIR 1975 Guj 54; (1974) 15 Guj LR 655 (FB).

175. *Mariammal v. Lakshmanan*, AIR 1959 Ker 297; *Prakash Chander v. Sunder Bai*, AIR 1979 Raj 108.

176. R. 9; see also *Puwada Venkateswara v. Chidamana Venkata*, (1976) 2 SCC 409.

177. *Bheru Lal v. Shanti Lal*, AIR 1985 Raj 53; 1984 Raj LR 102; 1984 Raj LW 62.

178. Rr. 21, 23, S. 28.                      179. S. 29.

(iii) Where the summons is to be served within the Presidency Towns of Bombay, Madras and Calcutta, it may be sent to the Court of Small Causes within whose jurisdiction it is to be served.<sup>180</sup>

(iv) Where the defendant resides out of India and has no authorised agent in India to accept service, the summons should be addressed to the defendant at the place where he is residing and sent to him by post, or courier service, or fax message, or Electronic Mail Service, or by any other appropriate means, if there is postal communication between such place and the place where the court is situate.<sup>181</sup>

(v) Where the defendant resides in a foreign country, the service of summons may be effected through the political agent there or a court established there with authority to serve summons.<sup>182</sup>

(vi) Where the defendant is a public officer (not belonging to the Indian Military, Naval or Air Forces), or is a servant of the railway company or local authority, the summons may be served through the head of the department in which the defendant is employed.<sup>183</sup>

(vii) Where the defendant is a soldier, sailor or airman, the court shall send the summons for service to his commanding officer.<sup>184</sup>

(viii) Where the defendant is in prison, the service of summons is to be made on the officer in charge of the prison.<sup>185</sup>

(ix) Where the defendant is a corporation, the summons may be served on the secretary, or on any director or other principal officer of the corporation; or by leaving it or sending it by post addressed to the corporation at the registered office or if there is no registered office, then at the place where the corporation carries on business.<sup>186</sup>

(x) Where the defendants are partners in any firm, the summons should be served upon any one or more of the partners; or upon any person having the control or management of the partnership business at its principal place of business in India. But if the plaintiff knows that the partnership firm has been dissolved before the institution of the suit, the summons shall be served upon every person sought to be held liable in India.<sup>187</sup>

(xi) A court may substitute for a summons, a letter of request which may contain all particulars required to be stated in a summons. This step may be taken by the court keeping in view the office held or position occupied by the defendant.<sup>188</sup>

180 R 22

183 R 27, *see also* R 29

186 Or 29 R 2

181 R 25

184 R 28, *see also* R 29

187 Or 30 R 3

182 Rr 26, 26-A

185 R 24, *see also*, R 29

188 R 30

## 5. WRITTEN STATEMENT: ORDER 8

### (a) Meaning

Though the expression "written statement" has not been defined in the Code, it is "a term of specific connotation ordinarily signifying a reply to the plaint filed by the plaintiff".<sup>189</sup> In other words, a written statement is the pleading of the defendant wherein he deals with every material fact alleged by the plaintiff in his plaint and also states any new facts in his favour or takes legal objections against the claim of the plaintiff.<sup>190</sup>

### (b) Who may file written statement?

A written statement may be filed by the defendant or by his duly constituted agent. Where there are several defendants and a common written statement is filed by them, it must be signed by all of them. It is, however, sufficient if it is verified by one of them who is aware of the facts of the case and is in a position to file an affidavit. But a written statement filed by one defendant does not bind other defendants.<sup>191</sup>

### (c) When written statement may be filed?

A defendant should, within thirty days from the service of summons on him, present a written statement of his defence. The said period, however, can be extended up to ninety days.<sup>192</sup>

### (d) Outer limit for filing written statement

Proviso to Rule 1 as inserted by the Amendment Act, 2002 prescribes outer limit of ninety days of filing written statement from the date of service of summons on the defendant.

In *Kailash v. Nanhku*<sup>193</sup>, the Supreme Court was called upon to consider whether the time-limit of ninety days prescribed by the proviso to Rule 1 of Order 8 for filing written statement by the defendant was mandatory or merely directory.

Considering the provision of the Code as originally enacted, recommendations of the Law Commission, anxiety of Parliament to ensure speedy disposal of cases but without sacrificing fairness of trial and

189. *Food Corporation of India v. Yadav Engineer & Contractor*, (1982) 2 SCC 499; *Rachappa Gurudappa v. Gurudiddappa Nurandappa*, (1989) 3 SCC 245 at p. 250. AIR 1989 SC 635 at p. 639.

190. See *supra*, Chap. 6

191. *Jugeshar Tiwari v. Sheopujan Tiwary*, AIR 1986 Pat 35; 1986 BLJ 472.

192. R. 1

193. (2005) 4 SCC 480. AIR 2005 SC 2441.

principles of natural justice inbuilt in all procedural laws, the court held the provision directory and permissive and not mandatory and imperative.

"The process of justice may be speeded up and hurried but the fairness which is a basic element of justice cannot be permitted to be buried."<sup>194</sup>

The Court rightly stated, "All the rules of procedure are the hand-maid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of the CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice."<sup>195</sup>

The Court concluded, "Merely, because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form."<sup>196</sup>

In the leading decision of *Salem Advocate Bar Assn. (2) v. Union of India*<sup>197</sup>, harmoniously construing Rules 1, 9 and 10 of Order 8, the Supreme Court observed:

"In construing this provision, support can also be had from Order 8 Rule 10 which provides that where any party from whom a written statement is required under Rule 1 or Rule 9, fails to present the same within the time permitted or fixed by the Court, the Court shall pronounce judgment against him, or make such other order in relation to the suit as it thinks fit. On failure to file written statement under this provision, the Court has been given the discretion either to pronounce judgment against the defendant or make such other order in relation to suit as it thinks fit. In the context of the provision, despite use of the word 'shall', the court has been given the discretion to pronounce or not to pronounce the judgment against the defendant even if written statement is not filed and instead pass such order as it may think fit in relation to the suit. In construing the provision of Order 8 Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied. The effect would be that under Rule

194 *Ibid.* at p 495 (SCC) at p 2449 (AIR).

195 *Ibid.* at p 495 (SCC) at p 2449 (AIR).

196. *Ibid.* at p 495 (SCC) at p 2450 (AIR) *see also*, the following observations of Krishna Iyer J in *Sushil Kumar v. State of Bihar* (1975) 1 SCC 774 AIR 1975 SC 1185. "The morality of justice at the hands of law troubles a judge's conscience and points an angry interrogation at the law reformer"

197 (2005) 6 SCC 344 AIR 2005 SC 3353

10 of Order 8, the court in its discretion would have power to allow the defendant to file written statement even after expiry of period of 90 days provided in Order 8 Rule 1. There is no restriction in Order 8 Rule 10 that after expiry of ninety days, further time cannot be granted. The Court has wide power to 'make such order in relation to the suit as it thinks fit'. Clearly, therefore, the provision of Order 8 Rule 1 providing for upper limit of 90 days to file written statement is directory. Having said so, we wish to make it clear that the order extending time to file written statement cannot be made in routine. The time can be extended only in exceptionally hard cases. *While extending time, it has to be borne in mind that the legislature has fixed the upper time limit of 90 days. The discretion of the Court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order 8 Rule 1.*"<sup>198</sup> (emphasis supplied)

### (e) Particulars<sup>199</sup>: Rules 1-5 and 7-10

A written statement should be drafted carefully and artistically.<sup>200</sup> All the general rules of pleadings discussed in Chap. 6, apply to a written statement also. Before proceeding to draft a written statement it is absolutely necessary to examine the plaint carefully. Like a plaintiff, a defendant may also take a number of defences, either simply or in the alternative, even though they may be inconsistent, provided they are maintainable at law and are not embarrassing.

### (f) Special rules of defence

Over and above the general defences, Rules 2 to 5 and 7 to 10 deal with special points regarding filing of a written statement:

(1) New facts, such as the suit is not maintainable, or that the transaction is either void or voidable in law, and all such grounds of defence as, if not raised, would take the plaintiff by surprise, or would raise issues of fact not arising out of the plaint, such as fraud, limitation, release, payment, performance or facts showing illegality, etc. must be raised.<sup>201</sup>

"The effect of the rule is, for reasons of practice and justice and convenience, to require the party to tell his opponent what he is coming to the Court to prove. If he does not do that, the Court will deal with

198 *Ibid.*, at p. 364 (SCC); at pp. 3360-61 (AIR); see also *Rani Kusum v. Kanchan Devi*, (2005) 6 SCC 705; AIR 2005 SC 2304, *Sk. Salim Haji v. Kumar*, (2006) 1 SCC 46. AIR 2006 SC 396, *R.N. Jai & Bros v. Subhashchandra*, (2007) 6 SCC 420; AIR 2007 SC 2571; *Sumtibat v. Paras Finance Co.*, (2007) 10 SCC 82. AIR 2007 SC 3166.

199. For a Model Written Statement, see, Appendix B 200. *Ibid.*

201. R. 2. See also *Kalyanpur Lime Works Ltd. v. State of Bihar*, AIR 1954 SC 165 at pp. 168-69; 1954 SCR 958; *Badat and Co. v. East India Trading Co.*, AIR 1964 SC 538 (1964) 4 SCR 19, 126, 130, 136, 137, 252, 253, 255, 256, *Bhagat Singh v. Jaswant Singh*, AIR 1966 SC 1861 at pp. 1862-63; *Union of India v. Surjit Singh*, (1979) 1 SCC 520 at p. 524; AIR 1979 SC 1701 at p. 1703.

it in one of two ways. It may say that it is not open to him, that he has not raised it and will not be allowed to rely on it; or it may give leave to amend by raising it and protect the other party. If necessary, by letting the case stand over. The rule is not one that excludes from the consideration of the Court the relevant subject-matter for decision simply on the ground that it is not pleaded. *It leaves the party at the mercy of the Court and the Court will deal with him as is just.*"<sup>202</sup> (emphasis supplied)

If the plea is not taken, it may lead the plaintiff to believe that the defendant has waived his right by not relying on that point. And the defendant will not be entitled, as of right, to rely on any ground of defence which he has not taken in his written statement.<sup>203</sup> Whether such a plea has been raised in the written statement or not is a matter of construction of the written statement.<sup>204</sup>

Again, if the plea or ground of defence raises an issue arising out of admitted facts or is otherwise apparent from the plaint itself, no question of prejudice or surprise to the plaintiff arises.<sup>205</sup> This rule does not require the defendant to take such a plea nor debars him from setting it up at a later stage of the suit when it does not depend on evidence but raises a pure question of law, like a plea of limitation.<sup>206</sup> Similarly, where the defendant has stated in his pleadings all the facts on which he bases his defence without stating the legal effect thereof, the defence cannot be rejected on the ground that the legal effect of the facts was not stated.<sup>207</sup>

(2) The denial must be specific. It is not sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but he must deal specifically with each allegation of fact which he does not admit, except damages.<sup>208</sup>

(3) The denial should not be vague or evasive. Where a defendant wants to deny any allegation of fact in the plaint, he must do so clearly, specifically and explicitly and not evasively or generally. Thus, if it is

202. *Robinson's Settlement, Re*, (1912) 1 Ch D 717 (CA) at p 728; *Udhav Singh v Madhav Rao Scindia*, (1977) 1 SCC 511. AIR 1976 SC 744 at p 749.

203. *Udhav Singh v. Madhav Rao Scindia*, (1977) 1 SCC 511. See also *Surasathalini Debi v Phanindra Mohan*, AIR 1965 SC 1364 at p 1370 (1965) 1 SCR 861, *Shipping Corpn of India Ltd v. Nisar Export Corpn*, (1981) 1 SCC 564 AIR 1981 SC 1212 at p 1214

204. *C Abdul Shukoor v. A P Rao*, AIR 1963 SC 1150 at p 1153 1963 Supp (2) SCR 55, *Udhav Singh v Madhav Rao Scindia*, (1977) 1 SCC 511 at p 750 (AIR), *Sk Abdul Sattar v Union of India*, (1970) 3 SCC 845 at p 847 AIR 1970 SC 479 at p 482, *Jahuri Sah v Dwarika Prasad*, AIR 1967 SC 109 at p 111 1966 Supp SCR 280

205. *Udhav Singh v Madhav Rao Scindia*, (1977) 1 SCC 511 at p 749 (AIR), *Rama Shankar v Shyamlat Devi* AIR 1970 SC 716 at p 717 (1969) 2 SCR 360

206. *Ibid*. See also *Scott v Brown Doering McNab & Co*, (1892) 2 QB 724 (1891-94) All ER Rep 654 (CA), *Edler v Auerbach*, (1950) 1 KB 359 at p 371 (1949) 2 All ER 692 *Surasathalini Debi v Phanindra Mohan* AIR 1965 SC 1364 at p 1370

207. *Ibid* See also *C Abdul Shukoor v A P Rao*, AIR 1963 SC 1150 at p 1153 1963 Supp (2) SCR 55

208. R 3 See also *Balrat & Co v East India Trading Co.*, AIR 1964 SC 538

alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received.<sup>209</sup>

(4) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleadings of the defendant, shall be taken to be admitted except as against a person under disability. The court may, however, require proof of any such fact otherwise than by such admission. When the defendant has not filed a written statement the court may either pronounce the judgment on the basis of the facts stated in the plaint (except as against a person under disability), or may require any such fact to be proved.<sup>210</sup> If a judgment is pronounced by the court, a decree shall be drawn up in accordance with it.<sup>211</sup>

The combined effect of Rules 3, 4 and 5 has been considered by Subba Rao, J. (as he then was) in the case of *Badat & Co. v. East India Trading Co.*<sup>212</sup> in the following words:

"These three rules form an integral code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing from its non-compliance. The written statement must deal specifically with each allegation of fact in the plaint and when a defendant denies any such fact, he must not do so evasively, but answer the point of substance. *If his denial of a fact is not specific but evasive, the said fact shall be taken to be admitted.* In such an event, the admission itself being proof, no other proof is necessary."<sup>213</sup> (emphasis supplied)

A few illustrative cases will make the position clear:

In an action against a lessee to set aside the lease, the plaintiff alleges in his plaint that the defendant offered to the manager of the plaintiff a bribe of Rs 5000 at the defendant's office on 15 January 1997; and the defendant in his written statement states that he did not offer to the plaintiff's manager a bribe of Rs 5000 at the defendant's office on 15 January 1997; the denial is evasive. Here the point of substance is that a bribe was offered (neither the day nor the amount) and that is not met.

209. R. 4. See also *Badat & Co. v. East India Trading Co.*, AIR 1964 SC 538.

210. R. 5. *Ibid.*

211. *Ibid.*

212. *Badat and Co. v. East India Trading Co.*, AIR 1964 SC 538 (1964) 4 SCR 19, 126, 130, 136, 137, 252, 253, 255, 256.

213. *Ibid.*, at p. 545 (AIR). See also *Munshi Dass v. Mal Singh*, (1977) 4 SCC 65 at p. 67. AIR 1977 SC 2002 at p. 2004, *Sk Abdul Sattar v. Union of India*, (1970) 3 SCC 845 AIR 1970 SC 479; *Modula India v. Kamakshya Singh*, (1988) 4 SCC 619 at p. 643. AIR 1989 SC 162 at p. 176, *Lohia Properties (P) Ltd. v. Atmaram Kumar*, (1993) 4 SCC 6, *Balraj Taneja v. Sunil Madan*, (1999) 8 SCC 396 AIR 1999 SC 3381. [See also, the following observations: "To say that a defendant has no knowledge of a fact pleaded by the plaintiff is not tantamount to a denial of the existence of that fact, not even an implied denial." *Jahuri Sah v. Dwarika Prasad*, AIR 1967 SC 109 at p. 111. 1966 Supp SCR 280] (per Mudholkar, J.).

The defendant might have offered any other amount on another day at a different place. Since the point of substance is the offer of bribe, it must be clearly and specifically denied and the defendant should state that he never offered a bribe of Rs 5000 or of any other sum, on any day, at any place, to the plaintiff's manager as alleged or at all.<sup>214</sup>

Similarly, if the plaintiff asserts:

The defendant broke and entered into the shop of the plaintiff and seized, took and carried away all the furniture, stock-in-trade, and other effects which were therein.

The correct traverse will be:

The defendant never broke or entered into the shop of the plaintiff or seized, took or carried away any of the furniture, stock-in-trade, and other effects which were therein.<sup>215</sup>

Again, when a compound allegation, consisting of several distinct facts, is made in the plaint, and it is intended to deny each of such facts, a single denial of the whole allegation should not be made. The defendant should break up the allegation into separate parts and deny each of them separately. For instance, if the plaintiff alleges that the defendant took possession of the plaintiff's house and the defendant wants to deny both the allegations of having taken possession of the house as well as the plaintiff's ownership of the house, he must do so expressly by saying:

- (1) The defendant never took possession of the house.
- (2) The said house is not of the plaintiff.

A single traverse, "the defendant denies that he took possession of the plaintiff's house", would not be specific since it may mean that the defendant only denies having taken possession of the house and not the ownership of the plaintiff.<sup>216</sup>

But if the plaintiff makes general allegations in the plaint and they are answered by equally general denials, no complaint can be made by the plaintiff on the ground that they are not specific.<sup>217</sup> Thus, where the plaintiff alleges in the plaint that the order of his removal from service was violative of Articles 14 and 16 of the Constitution of India since he was arbitrarily picked up, the denial in the written statement of the allegation that there had been a violation of Articles 14 and 16 of the Constitution of India is sufficient. In the absence of particulars in the plaint, all that the defendant could do would be simply to deny that

214 *Tildesley v Harper*, (1878) 10 Ch D 393 (1874-80) All ER Rep Ext 1612 (CA). See also *Badat and Co. v East India Trading Co.*, AIR 1964 SC 538 (1964) 4 SCR 19, 126, 130, 136, 137, 252, 253, 255, 256.

215 Bullen, Leake and Jacob, *supra*, at p. 665.

216 *Mogha* *supra* at p. 127.

217 *Munshi Dass v Mal Singh*, (1977) 4 SCC 65 AIR 1977 SC 2002.

there had been discrimination.<sup>218</sup> Again, express or numerical denial of a particular para of the plaint is only a matter of *form* and not of *substance*, and the written statement must be read as a whole and it would be sufficient if the allegations made in the plaint have been specifically denied even if denial of a particular para of the plaint is omitted in the defence.<sup>219</sup>

Moreover, old and traditional system of pleading has been given up. As stated by Lord Denning,<sup>220</sup> at one time, general denial was held insufficient and embarrassing. But that is not the position today. Sometimes, the pleader "denies", sometimes, he "does not admit" each and every allegation; but whatever phrase is used it all comes back to the same thing. The allegation is to be regarded "as if it were specifically set out and traversed seriatim." *In short, it is a traverse, no more and no less.*

(emphasis supplied)

(5) Where the defendant relies upon several distinct grounds of defence or set-off or counterclaim founded upon separate and distinct facts, they should be stated separately and distinctly.<sup>221</sup>

(6) Any new ground of defence which has arisen after the institution of the suit or presentation of a written statement claiming a set-off or counterclaim may be raised by the defendant or plaintiff, as the case may be, in his written statement.<sup>222</sup> Here the court is empowered to take notice of subsequent events.<sup>223</sup>

(7) No pleading after the written statement of the defendant other than by way of defence to a set-off or counterclaim can be filed. The court may, however, allow any party to file his pleading upon such terms as it thinks fit.<sup>224</sup>

(8) If the defendant fails to present his written statement within the time permitted or fixed by the court, the court will pronounce the judgment against him or pass such order in relation to the suit as it thinks fit and a decree will be drawn up according to the said judgment.<sup>225</sup>

218. *Ibid*, see also *Union of India v. Pandurang*, AIR 1962 SC 630: (1961) 2 LLJ 427; *Surendra Nath v. Stephen Court Ltd.*, AIR 1966 SC 1361 at p. 1363 (1966) 3 SCR 458, *Bhagat Singh v. Jaswant Singh*, AIR 1966 SC 1861.

219. *Shipping Corpn. of India Ltd. v. Nisar Export Corpn.*, (1981) 1 SCC 564 at p. 566: AIR 1981 SC 1212 at p. 1214. See also *Union of India v. Khas Karanpura Colliery Co. Ltd.*, AIR 1969 SC 125 at p. 127 (1968) 3 SCR 784; *K C Kapoor v. Radhika Devi*, (1981) 4 SCC 487 at pp. 499-500. AIR 1981 SC 2128; *Badat and Co. v. East India Trading Co.*, AIR 1964 SC 538 (1964) 4 SCR 19, 126, 130, 136, 137, 252, 253, 255, 256.

220. *Warner v. Sampson*, (1959) 2 WLR 109 at p. 114.

221. R. 7.

222. R. 8. See also *Sk. Abdul Sattar v. Union of India*, (1970) 3 SCC 845.

223. For detailed discussion, see *supra*, "Events happening after institution of suit".

224. R. 9.

225. R. 10. See also *Sangram Singh v. Election Tribunal*, AIR 1955 SC 425 at pp. 432-33: (1955) 2 SCR 1; *Modula India v. Kamakshya Singh*, (1988) 4 SCC 619.

The court, however, cannot proceed to pass a judgment blindly merely because no written statement is filed by the defendant traversing the averment made by the plaintiff in his plaint.<sup>226</sup>

In *Modula India v. Kamakshya Singh Deo*<sup>227</sup>, explaining the ambit and scheme of Rules 1, 5 and 10 of Order 8, the Supreme Court observed, "Rule 1 merely requires that the defendant should present a written statement of his defence within the time permitted by the Court. Under Rule 5(2), where the defendant has not filed a pleading it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint except against a person under disability but the court may at its discretion require any such fact to be proved. Again under Rule 10 when any party from whom a written statement is required fails to present the same within the time permitted or fixed by the Court, the Court 'shall pronounce judgment against him or make such order in relation to the suit as it thinks fit'. It will be seen that these rules are only permissive in nature. They enable the Court in an appropriate case to pronounce a decree straightway on the basis of the plaint and the averments contained therein. Though the present language of Rule 10 says that the Court 'shall' pronounce judgment against him, it is obvious from the language of the rule that there is still an option with the Court either to pronounce judgment on the basis of the plaint against the defendant or to make such other appropriate order as the Court may think fit. Therefore, *there is nothing in these rules, which makes it mandatory for the Court to pass a decree in favour of the plaintiff straightway because a written statement has not been filed.*"<sup>228</sup> (emphasis supplied)

It is submitted that the following observations of the Supreme Court in *Balraj Taneja v. Sunil Madan*<sup>229</sup> lay down correct law on the point. Considering the relevant provisions of Orders 8 and 20 and referring to leading decisions on the point, the Court stated:

"[T]he court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor should the court proceed to pass judgment blindly merely because a written statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the court. In a case, specially where a written statement has not been filed by the defendant, the court should be a little cautious in proceeding under Order 8 Rule 10 CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in

226 *Balraj Taneja v. Sunil Madan, Badat and Co. v. East India Trading Co.*, AIR 1964 SC 538 (1964) 4 SCR 19, 126, 130, 136, 137, 252, 253, 255, 256, *Modula India v. Kamakshya Singh* (1988) 4 SCC 619

227 (1988) 4 SCC 619 AIR 1989 SC 162

228 *Ibid.*, at p. 643 (SCC) at p. 176 (AIR), see also *Balraj Taneja v. Sunil Madan*, (1999) 8 SCC 396 AIR 1999 SC 1381

229 (1999) 8 SCC 396 AIR 1999 SC 1381

favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of the court's satisfaction and, therefore, only on being satisfied that there is no fact which needs to be proved on account of deemed admission, the court can conveniently pass a judgment against the defendant who has not filed the written statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression 'the court may, in its discretion, require any such fact to be proved' used in sub-rule (2) of Rule 5 of Order 8, or the expression 'may make such order in relation to the suit as it thinks fit' used in Rule 10 of Order 8."<sup>230</sup>

### (g) Documents relied on in written statement: Rule 1

Like a plaintiff, a defendant is also bound to produce all the documents in support of his defence, or claim for set-off or counterclaim which are in his possession. If the defendant fails to produce them, they will not be received in evidence except with the leave of the court. This provision, however, does not apply to the following documents;

- (i) documents reserved for cross-examination of the plaintiff's witnesses; or
- (ii) documents handed over to a witness merely to refresh his memory.<sup>231</sup>

## 6. SET-OFF: RULE 6

### (a) Meaning

"Set-off" means a claim set up against another. It is a cross-claim which partly offsets the original claim. It is an extinction of debts of which two persons are reciprocally debtors to one another by the credits of which they are reciprocally creditors to one another. Where there are mutual debts between the plaintiff and the defendant, one debt may be settled against the other.<sup>232</sup> It is a plea in defence, available to the defendant. By

230. *Ibid*, at p. 410 (SCC) at pp 3387-88 (AIR), see also *Sushila Jain v. Rajasthan Financial Corpn.*, AIR 1979 Raj 215; 1979 RLW 208.

231. R. 1-A. See also *infra*, *Balraj Taneja v. Sunil Madan*, (1999) 8 SCC 396 AIR 1999 SC 3381; and, Chap. 10.

232. *Chamber's 21st Century Dictionary* (1997) at p. 1283; *Concise Oxford English Dictionary* (2002) at p. 1312; *Stroud's Judicial Dictionary* (1986) Vol. 5 at p. 2387; P.R. Aiyar, *Advanced Law Lexicon* (2005) Vol. 4 at pp. 4312-13, Justice C.K. Thakker, *Encyclopaedic Law Lexicon* (2009) Vol. IV at p. 4350, *Union of India v. Karam Chand Thapar and Bros (Coal Sales) Ltd.*, (2004) 3 SCC 504.

adjustment, set-off either wipes out or reduces the plaintiff's claim in a suit for recovery of money.

### (b) Doctrine explained

Where in a suit for recovery of money by the plaintiff, the defendant finds that he has also a claim of some amount against the plaintiff, he can claim a set-off in respect of the said amount. The doctrine of set-off may be defined as "the extinction of debts of which two persons are reciprocally debtors to one another by the credits of which they are reciprocally creditors to one another".<sup>233</sup>

A plea of set-off is "a plea whereby a defendant acknowledges the justice of the plaintiff's demand, but sets up another demand of his own, to counterbalance that of the plaintiff; either in whole or in part". Thus, it is a "reciprocal acquittal of debts between two persons". The right of a defendant to claim set-off has been recognised under Rule 6. It obviates the necessity of filing a fresh suit by the defendant.

### (c) Illustrations

Let us see a few illustrations to understand the doctrine:

(a) *A* bequeaths Rs 2000 to *B* and appoints *C* his executor and residuary legatee. *B* dies and *D* takes out administration to *B*'s effects. *C* pays Rs 1000 as surety for *D*; then *D* sues *C* for the legacy. *C* cannot set-off the debt of Rs 1000 against the legacy, for neither *C* nor *D* fills the same character with respect to the legacy as they fill with respect to the payment of Rs 1000.

(b) *A* dies intestate and in debt to *B*. *C* takes out administration to *A*'s effects and *B* buys part of the effects from *C*. In a suit for the purchase-money by *C* against *B*, the latter cannot set-off the debt against the price, for *C* fills two different characters, one as the vendor to *B*, in which he sues *B*, and the other as representative to *A*.

(c) *A* sues *B* on a bill of exchange. *B* alleges that *A* has wrongfully neglected to ensure *B*'s goods and is liable to him in compensation which he claims to set-off. The amount not being ascertained cannot be set-off.

(d) *A* sues *B* on a bill of exchange for Rs 500. *B* holds a judgment against *A* for Rs 1000. The two claims being both definite, pecuniary demands may be set-off.

(e) *A* sues *B* for compensation on account of trespass. *B* holds a promissory note for Rs 1000 from *A* and claims to set-off that amount against

<sup>233</sup> *Jyanti Lal v Abdul Aziz*, AIR 1956 Pat 199 at p 200, *B Seshiah v B Veerabhadraiah*, AIR 1972 AP 134 (FB)

any sum that *A* may recover in the suit. *B* may do so, for, as soon as *A* recovers, both sums are definite pecuniary demands.

(f) *A* and *B* sue *C* for Rs 1000. *C* cannot set-off a debt due to him by *A* alone.

(g) *A* sues *B* and *C* for Rs 1000. *B* cannot set-off a debt due to him alone by *A*.

(h) *A* owes the partnership firm of *B* and *C* Rs 1000. *B* dies, leaving *C* surviving. *A* sues *C* for a debt of Rs 1500 due in his separate character. *C* may set-off the debt of Rs 1000.

(i) *A* sues *B* for Rs 20,000. *B* cannot set-off the claim for damages for breach of contract for specific performance.

(j) *A* sues *B* for Rs 10,000. *B* cannot set-off any amount due to him on a promissory note executed by *A* before five years.

(k) *A* sues *B* for Rs 10,000. *B* cannot claim set-off of any amount due to him towards salary for performing illegal or immoral activities of *A*.

(l) *A* sues *B* for Rs 15,000. *B* cannot set-off an amount of Rs 30,000 if the court in which the suit filed by *A* has pecuniary jurisdiction up to Rs 20,000 only.

#### (d) Types

The law recognises two types of set-off.

- (i) Legal set-off; and
- (ii) Equitable set-off.

Order 8 Rule 6 deals with legal set-off. But the said provision is not exhaustive and does not take away the power of the court to allow such adjustment independent of Rule 6 of Order 8. It is known as "equitable set-off".<sup>234</sup>

#### (e) Conditions

A defendant may claim a set-off, if the following conditions are satisfied:

- (i) The suit must be for the recovery of money; [see Illustration (i)]
- (ii) The sum of money must be ascertained; [see Illustrations (c), (d) and (e)]
- (iii) Such sum must be legally recoverable; [see Illustrations (j) and (k)]
- (iv) It must be recoverable by the defendant or by all the defendants, if more than one; [see Illustration (g)]
- (v) It must be recoverable by the defendant from the plaintiff or from all the plaintiffs, if more than one; [see Illustration (f)]

234. For detailed discussion, see *infra*, "Equitable set-off".

- (vi) It must not exceed the pecuniary jurisdiction of the court in which the suit is brought; [see Illustration (l)] and
- (vii) Both the parties must fill, in the defendant's claim to set-off, the same character as they fill in the plaintiff's suit. [see Illustrations (a), (b) and (h)].

### (f) Effect of set-off

When a defendant pleads set-off, he is put in the position of a plaintiff as regards the amount claimed by him. There are two suits, one by the plaintiff against the defendant and the other by the defendant against the plaintiff; and they are tried together. A separate suit number, however, is not given to a set-off. Where the plaintiff does not appear and his suit is dismissed for default, or he withdraws his suit, or he fails to substantiate his claim at the trial and his suit is dismissed, it does not affect the claim for a set-off by the defendant and a decree may be passed in favour of the defendant if he is able to prove his claim.<sup>235</sup>

### (g) Equitable set-off

Rule 6 deals with legal set-off only. It was allowed by the Court of Common Law in England. It is always in respect of an ascertained sum of money. But there may be cases in which the defendant may be allowed a set-off in respect of an unascertained sum of money. The provisions of Rule 6 are, however, not exhaustive. In addition to legal set-off, equitable set-off, as allowed by the Courts of Equity in England, may be claimed by the defendant in respect of even an unascertained sum of money, provided that both the cross-demands arise out of one and the same transaction or are so connected, in the nature and circumstances, that they can be looked upon as parts of one transaction.<sup>236</sup> In such a case, it would be *inequitable* to drive the defendant to a separate suit. As it is, Order 20 Rule 19(3) of the Code recognises an equitable set-off.

Thus, where *A* sues *B* to recover Rs 50,000 under a contract, *B* can claim set-off towards damages sustained by him due to breach of the same contract by *A*.<sup>237</sup> Likewise, in a suit by a servant against his master for salary, the latter can claim set-off for loss sustained by him because

235 Or 20 R 19(1), see also *Mailadi Seetharama v Vijayawada Municipality*, AIR 1957 AP 896, *Dayaram v Jokharam*, AIR 1960 MP 393, *Jamnadas v Behari*, AIR 1941 Nag 258 1941 Nag LJ 382

236. *Stephen Clark v Ruthnavatoochetti*, (1865) 2 Mad HCR 296. *Bhupendra Naram v Bahadur Singh*, AIR 1952 SC 201 1952 SCR 782, *Govt. of United State of Travancore & Cochin v Bank of Cochin Ltd* AIR 1954 TC 243 11R 1953 TC 1161 (FB), *Union of India v Karam Chand Thapar and Bros. (Coal Sales) Ltd*, (2004) 3 SCC 504

237. *Harischandra Dwarkadas Cloth Market v Firm Murlidhar Chironjwal*, AIR 1957 MB 53

of negligence or misconduct by the former since such claim arises out of the same relationship.<sup>238</sup> Again, in a suit by a washerman for his wages, the defendant-employer may set-off the price of the clothes lost by the plaintiff.<sup>239</sup>

#### (h) Legal and equitable set-off: Distinction

- (a) Legal set-off must be for an ascertained sum of money. Equitable set-off may be allowed even for an unascertained sum of money.
- (b) Legal set-off can be claimed of as right and the court is bound to entertain and adjudicate upon it. Equitable set-off, on the other hand, cannot be claimed as of right and the court has discretion to refuse to adjudicate upon it.
- (c) In a legal set-off, it is not necessary that the cross-demands arise out of the same transaction. Equitable set-off can be allowed only when the cross-demands arise out of the same transaction.
- (d) In a legal set-off, it is necessary that the amount claimed as set-off must be legally recoverable and must not be time-barred. A claim by way of equitable set-off may be allowed even if it is time-barred when there is a fiduciary relationship between the parties.

Thus, a trustee in possession of the trust estate may by way of equitable set-off claim to be indemnified out of the trust estate when called upon to account even though such claim of indemnity is time-barred. It must, however, be noted that even in case of equitable set-off, if at the date of the written statement, the defendant's claim is time-barred, though not barred at the date of the suit, it will be allowed only to the extent of the plaintiff's claim, but a decree will not be passed in his favour for the balance found due to him.

- (e) A legal set-off requires a court fee, but no court fee is required in the case of an equitable set-off.

#### (i) Set-off and counterclaim: Distinction<sup>240</sup>

### 7. COUNTERCLAIM: RULES 6-A-6-G

#### (a) Meaning

"Counterclaim" may be defined as "a claim made by the defendant in a suit against the plaintiff". It is a claim independent of, and separable

238. *Chishtom v. Gopal Chander*, ILR (1889) 16 Cal 711.

239. *Maiden v. Bhodu*, (1910) 7 IC 1006.

240. See *infra*, "Counterclaim".

from, the plaintiff's claim which can be enforced by a cross-action. It is a cause of action in favour of the defendant against the plaintiff.<sup>241</sup>

### (b) Doctrine explained

One of the pleas open to a defendant to defeat the relief sought by the plaintiff against him is a counterclaim. Counterclaim may be defined as "a claim made by the defendant in a suit against the plaintiff".<sup>242</sup> Therefore, a defendant in a suit may, in addition to his right to plead a set-off, set up a counterclaim. It may be set up only in respect of a claim for which the defendant can file a separate suit.<sup>243</sup> Thus, a counterclaim is substantially a cross-action.<sup>244</sup>

Before the Amendment Act of 1976, there was no specific provision for counterclaim in the Code. The Supreme Court, however, held the right to make a counterclaim statutory.<sup>245</sup> It was held that the court has power to treat the counterclaim as a cross-suit and hear the original suit and counterclaim together if the counterclaim is properly stamped.

In the leading case of *Laxmidas v. Nanabhai*<sup>246</sup>, the Supreme Court observed, "The question has therefore to be considered on principle as to whether there is anything in law—statutory or otherwise—which precludes a court from treating a counterclaim as a plaint in a cross-suit. It is difficult to see any. No doubt, the Code of Civil Procedure prescribes the contents of a plaint and it might very well be that a counterclaim which is to be treated as a cross-suit might not conform to all these requirements but this by itself is not sufficient to deny to the court the power and the jurisdiction to read and construe the pleadings in a reasonable manner. If, for instance, what is really a plaint in a cross-suit is made part of a written statement either by being made an annexure to it or as part and parcel thereof, though described as a counterclaim, there could be no legal objection to the court treating the same as a plaint and granting such relief to the defendant as would have been open if the pleading had taken the form of a plaint ... To hold otherwise

241. *Concise Oxford English Dictionary* (2002) at p. 325, *Black's Judicial Dictionary* (1999) at p. 348, *Stroud's Judicial Dictionary*, (1986) Vol. 5 at p. 2388, PR Aiyar, *Advanced Law Lexicon* (2005) Vol. I at p. 1093, Justice C K Thakker, *Encyclopaedia Law Lexicon* (2009) Vol. I at p. 1238.

242. *Concise Oxford English Dictionary* (2002) at p. 325. PR Aiyar, *supra*.

243. *Munshi Ram v. Radha Kishan*, AIR 1975 Punjab 112 at pp. 113-14.

244. *Amichand Puarelal v. Union of India*, (1977) 79 Bom LR 1. *Jyanti Lal v. Abdul Aziz*, AIR 1956 Pat 199.

245. *Laxmidas v. Nanabhai*, AIR 1964 SC 11 (1964) 2 SCR 567, *Mohinder Singh Jaggi v. Data Ram* (1972) 4 SCC 495, AIR 1972 SC 1048.

246. AIR 1964 SC 11 (1964) 2 SCR 567.

*would be to erect what in substance is a mere defect in a form of pleading into an instrument for denying what justice manifestly demands.*"<sup>247</sup>

(emphasis supplied)

### (c) Object

Before the Amendment Act of 1976, no counterclaim or set-off could be claimed except in money suits. The Law Commission of India, however, recommended to avoid multiplicity of proceedings, right to the defendant to raise a plea of set-off in addition to a counterclaim in the same suit.<sup>248</sup> The provisions relating to counterclaim thus seek to save time of courts, exclude inconvenience to the parties to litigation, decide all disputes between the same parties avoiding unnecessary multiplicity of judicial proceedings and prolong trials.<sup>249</sup>

### (d) Nature and scope

By the Amendment Act of 1976, a specific provision has been made for counterclaims by inserting Rules 6-A to 6-G. Under sub-rule (1) of Rule 6-A, the defendant may set up by way of counterclaim against the claim of the plaintiff any right or claim in respect of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time fixed for delivery of his defence has expired. Such counterclaim, however, should not exceed the pecuniary limits of the jurisdiction of the court. In other words, by laying the counterclaim, pecuniary jurisdiction of the court cannot be ousted and the power to try the suit already entertained cannot be taken away by accepting the counterclaim beyond its pecuniary jurisdiction.

When *A* has a claim of any land against *B* and brings an action to enforce that claim, and *B* has a cross-claim of any kind against *A* which by the law he is entitled to raise and have disposed of in the action brought by *A*, then *B* is said to have a right of counterclaim.<sup>250</sup> Similarly, in a suit for injunction, a counterclaim for possession can be allowed.<sup>251</sup>

247. *Ibid*, at p. 17 (AIR). See also *Bhim Sain v. Laxmi Narain*, AIR 1982 Punj 155; *Munshi Ram v. Radha Kishan*, AIR 1975 Punj 112; *Gupta (P) Loan Committee v. Moti Ram*, AIR 1984 J&K 38; *Nav Samaj Ltd. v. Shamrao Tukaramji*, AIR 1984 Bom 23.

248. Law Commission's Twenty-seventh Report at pp. 150-51; *Gurbachan Singh v. Bhag Singh*, (1996) 1 SCC 770; AIR 1996 SC 1087; *Jag Mohan v. Dera Radha Swami Satsang*, (1996) 4 SCC 699; AIR 1996 SC 2222; *Ramesh Chand v. Anil Panjwani*, (2003) 7 SCC 350; AIR 2003 SC 2508; *Rohit Singh v. State of Bihar*, (2006) 12 SCC 734; AIR 2007 SC 10.

249. *Ramesh Chand v. Anil Panjwani*, (2003) 7 SCC 350 at pp. 367-68; AIR 2003 SC 2508.

250. *Halsbury's Laws of England*, (4th Edn.) Vol. 42, para 407.

251. *Gurbachan Singh v. Bhag Singh*, (1996) 1 SCC 770.

### (e) Modes of setting up counterclaim

There are three modes of pleading or setting up a counterclaim in a civil suit:

- (i) In the written statement filed under Order 8 Rule 1;
- (ii) By amending written statement with the leave of the court and setting up counterclaim; and
- (iii) In a subsequent pleading under Order 8 Rule 9.<sup>252</sup>

### (f) Who may file counterclaim?

Normally, it is the defendant who may file a counterclaim against the plaintiff. But incidentally and along with the plaintiff, the defendant may also claim relief against the co-defendants in the suit. But a counterclaim *solely* against co-defendants is not maintainable.<sup>253</sup>

### (g) When counterclaim may be set up?

A counterclaim may be set up by a defendant against a plaintiff in respect of cause of action accruing either before or after filing of the suit, provided such claim is not barred by limitation.<sup>254</sup>

### (h) Effect of counterclaim

Such counterclaim has the effect of a cross-suit and the court can pronounce a final judgment both on the original claim and the counterclaim.<sup>255</sup> The counterclaim of the defendant will be treated as a plaint<sup>256</sup> and the plaintiff has a right to file a written statement in answer to the counterclaim of the defendant.<sup>257</sup>

The effect of the counterclaim is that even if the suit of the plaintiff is stayed, discontinued, dismissed or withdrawn, the counterclaim will be decided on merits,<sup>258</sup> and the defendant will have a right to get a decree for a counterclaim as claimed in the written statement.<sup>259</sup> If the plaintiff does not file any reply to the counterclaim made by the defendant, the court may pronounce the judgment against the plaintiff in relation to the counterclaim made against him or make such order in relation to the counterclaim as it thinks fit.<sup>260</sup> The counterclaim shall

252 *Ramesh Chand v. Anil Panpuri*, (2003) 7 SCC 350 at p. 367 AIR 2003 SC 2508

253 *Rohit Singh v. State of Bihar*, (2006) 12 SCC 734 at p. 744 AIR 2007 SC 10

254. *Mahendra Kumar v. State of M.P.*, (1987) 3 SCC 265 AIR 1987 SC 1395 *Jag Mohan v. Dera Radha Swami Satsang*, (1996) 1 SCC 699, *Shanti Ram v. Dinesh Chandra*, (1997) 8 SCC 174

255 R 6-A(2)

256 R 6-A(4)

257 R 6-A(3)

258 R 6-D See also *Daga Films v. Lotus Production*, AIR 1977 Cal 312 (317)

259 R 6 F

260 R 6 E

be treated as a plaint and will be governed by the rules applicable to plaints.<sup>261</sup> Similarly, a reply filed in answer to a counterclaim shall be treated as a written statement and governed by rules applicable to written statements.<sup>262</sup>

**(i) Set-off and counterclaim: Distinction<sup>263</sup>**

The distinction between a set-off and a counterclaim is very important and, therefore, must be carefully considered:

- (a) Set-off is a statutory defence to a plaintiff's action, whereas a counterclaim is substantially a cross-action.
- (b) Set-off must be for an ascertained sum or it must arise out of the same transaction; a counterclaim need not arise out of the same transaction.
- (c) Set-off is a ground of defence to the plaintiff's action. In other words, the former is a ground of defence, a shield, which if established, would afford an answer to the plaintiff's claim *in toto* (as a whole) or *pro tanto* (in proportion); the latter is a weapon of offence, a sword, which enables the defendant to enforce the claim against the plaintiff effectually as an independent action.
- (d) In the case of a legal set-off, the amount must be recoverable at the date of the suit, while in the case of a counterclaim the amount must be recoverable at the date of the written statement.
- (e) When the defendant demands in a plaintiff's suit an amount below or up to the suit claim, it is a set-off *stricto sensu*, but when it is for a larger amount, the claim for excess amount is really a counterclaim.<sup>264</sup>

261 R. 6-A(4).

262 R 6-G.

263. *Munshi Ram v. Radha Kishan*, AIR 1975 Punj 112; *Amichand Pyarelal v. Union of India*, (1977) 79 Bom LR 1.

264 *Ibid*, see also *A Z. Mohd Farooq v State Govt.*, AIR 1984 Ker 126 (FB), *Anand Enterprises v. Syndicate Bank*, AIR 1990 Kant 175 (1989) 2 Kant LJ 117

# CHAPTER 8

## Appearance and Non-appearance of Parties

### SYNOPSIS

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## 1. GENERAL

The provisions of the Code of Civil Procedure are based on a general principle that, as far as possible, no proceeding in a court of law should be conducted to the detriment of any party in his absence. Order 9 of the Code enacts the law with regard to the appearance of the parties to the suit and the consequences of their non-appearance. It also provides a remedy for setting aside an order of dismissal of the suit as also the setting aside of an *ex parte* decree passed against the defendant.

## 2. APPEARANCE OF PARTIES: RULES 1 AND 12

Rule 1 requires the parties to the suit to attend the court in person or by their pleaders on the day fixed in the summons for the defendant to appear. Rule 12 provides that where a plaintiff or a defendant, who has been ordered to appear in person, does not appear in person or show sufficient cause for non-appearance, the court may dismiss the suit, if he is the plaintiff, or proceed *ex parte* if he is the defendant.<sup>1</sup>

### 3. WHERE NEITHER PARTY APPEARS: RULE 3

Where neither the plaintiff nor the defendant appears when the suit is called out for hearing, the court may dismiss it.<sup>2</sup> The dismissal of the suit under Rule 3, however, does not bar a fresh suit in respect of the same cause of action.<sup>3</sup> The plaintiff may also apply for an order to set aside such dismissal. And if the court is satisfied that there was sufficient cause for his non-appearance, it shall pass an order setting aside the dismissal of the suit and shall fix a day for proceeding with the suit.<sup>4</sup>

#### 4. WHERE ONLY PLAINTIFF APPEARS: RULES 6, 10

Where the plaintiff appears and the defendant does not appear, the plaintiff has to prove service of summons on the defendant. If the service of summons is proved, the court may proceed *ex parte* against the defendant and may pass a decree in favour of the plaintiff, if the plaintiff proves his case.<sup>5</sup> This provision, however, is confined to first hearing and does not *per se* apply to subsequent hearings.<sup>6</sup>

1 See also, Or 3, R 1; *Jagraj Singh v. Birpal Kaur*, (2007) 2 SCC 564; AIR 2007 SC 2083.

2. Or 9 R 3. 3. R. 4 4 R. 4

5. R 6.

6. *Sangrami Singh v. Election Tribunal*, AIR 1955 SC 425. (1955) 2 SCR 1

Where there are two or more plaintiffs and one or more of them appear and the others do not appear, the court may permit the suit to proceed as if all the plaintiffs had appeared, or make such order as it thinks fit.<sup>7</sup>

## 5. WHERE ONLY DEFENDANT APPEARS: RULES 7-11

Where the defendant appears and the plaintiff does not appear, and the defendant does not admit the plaintiff's claim, wholly or partly, the court shall pass an order dismissing the suit.<sup>8</sup> But Rule 8 enacts that if the defendant admits the plaintiff's claim as a whole or a part thereof, the court will pass a decree against the defendant upon such admission and dismiss the suit for the rest of the claim.<sup>9</sup>

It may be noted that this rule (Rule 8) will apply to a case where there is only one plaintiff and he does not remain present, or there are two or more plaintiffs and all of them remain absent. Where there are more plaintiffs than one, and one or more of them appear, Rule 10 will apply.<sup>10</sup>

It is, however, a serious matter to dismiss the plaintiff's suit without hearing him and *that course ought not to be adopted unless the court is really satisfied that justice so requires.*<sup>11</sup> (emphasis supplied) But the Court has no power to dismiss the suit where the plaintiff does not appear owing to death. Such an order is a nullity inasmuch as this rule applies to a defaulter and not to a dead man.<sup>12</sup>

Rule 9 precludes the plaintiff thereafter from filing a fresh suit on the same cause of action. He may, however, apply for an order to set aside the order of dismissal. And if the court is satisfied that there was sufficient cause for his non-appearance the court may set aside the order of dismissal and fix a day for proceeding with the suit.<sup>13</sup>

7. R. 10.

8. R. 8; see also *Calcutta Port Trust v. Shalimar Tar Product Ltd.*, 1991 Supp (2) SCC 513; AIR 1991 SC 684.

9. *Ibid.*

10. *Kulendra Kishore v Rai Kishori Shaha*, AIR 1921 Cal 176 ILR (1921) 48 Cal 57.

11. *Per Beaumont, C.J.* in *Shamdasani v Central Bank of India Ltd.*, AIR 1938 Bom 199 at p 202. 40 Bom LR 238 (SB), see also *Arunachala Iyer v Subramaniam*, AIR 1923 Mad 63 ILR (1923) 46 Mad 60, see also, the following observation of Ferrers, J.C. in *Dayalmal v Naraindas*, MCA 24 of 1930 & Rev Appln. 29 of 1930, decided on 17 March 1932. "By the order we are about to make, we do not intend to condone procrastination or to encourage indolence. Some litigants are apt to be unpunctual, for this they must suffer condign punishment. But on the other hand, some Judges are prone to inconsiderate haste and unseemly impatience. This is the fault in which all Judges should be very careful not to fall." (emphasis supplied)

12. *Raja Debi Bakhsh v Habib Shah*, (1912-13) 40 IA 151 (PC), *P.M.M. Pinnayathri Amma v K Lakshmi Amma* AIR 1967 Ker 135.

13. *Lachi Tewari v Director of Land Records* 1984 Supp SCC 431 AIR 1984 SC 41; *Madhumilan Syntex Ltd v Union of India*, (2007) 11 SCC 297 AIR 2007 SC 1481.

In deciding whether a suit dismissed for default be restored, what has really to be considered is whether the plaintiff was really trying to appear on the day fixed. If he honestly intended to appear though in a stupid way, he should not be deprived of hearing.<sup>14</sup> If sufficient cause is shown by the plaintiff for his non-appearance, reopening is *mandatory*, but when sufficient cause is not shown, it is *directory*.<sup>15</sup>

What is sufficient cause depends upon facts and circumstances of each case and liberal and generous construction should be adopted to advance the cause of justice and restoration should not ordinarily be denied.<sup>16</sup> Where a party against whom an order is made appears on the same day and prays for recalling of order, *normally*, the prayer should be granted by the court.

In *Chhotalal v. Ambalal Hargovan*<sup>17</sup>, the High Court of Bombay observed that when a party arrives late and finds that his suit or application is dismissed, *he is entitled to have his suit or application restored on payment of costs*.

In a subsequent case in *Currimbhai v. N.H. Moos*,<sup>18</sup> the same High Court held that it would be difficult to agree with *Chhotalal* in principle as a proposition of law. "If such a rigid rule is laid down, it might mean this, that a defendant could successively prevent his suit ever being heard. All that he would have to do would be to appear late on successive dates, and allowed the suit to be heard *ex parte* and then to apply at the end of each day to have the suit restored for hearing. *That obviously is a course which no court would allow.*" (emphasis supplied)

It is submitted that the latter view is correct.

Before such order is passed by the court, notice must be served to the opposite party.<sup>19</sup>

Where there are two or more defendants and one or more of them appear and the others do not appear, the suit will proceed and at the time of pronouncement of the judgment, the court may make such order as to the absent defendants as it thinks fit.<sup>20</sup> In such a case, a decree may be contested as one against some of the defendants and *ex parte* against the rest.<sup>21</sup>

Where the court has adjourned the hearing of the suit *ex parte*, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, the court may hear him upon

14. *Motichand v. Ant Ram*, AIR 1952 Bho 33.

15. *P.K.P.R.M. Raman Chettyar v. K.A.P. Arunachalam Chettyar*, AIR 1936 Rang 335.

16. *Motichand v. Ant Ram*, AIR 1952 Bho 33; *Lakshmi Commercial Bank Ltd v Hans Raj*, AIR 1981 P&H 228.

17. AIR 1925 Bom 423 at p. 426 (1925) 27 Bom LR 685; 89 IC 225

18. AIR 1929 Bom 250 at p. 251; (1929) 31 Bom LR 468. 119 IC 187 (*per Marten, C.J.*).

19. R 9(2).

20. R. 11.

21. *Venutai v. Sadashiv*, AIR 1975 Bom 68; 1974 Mah LJ 951.

such terms as it directs as to the costs or otherwise.<sup>22</sup> In that case, the defendant might have the earlier proceedings recalled, "set the clock back", and have the suit heard in his presence. On the other hand, he might fail to show good cause. Even in such a case, he is not penalised in the sense of being forbidden to take part in the further proceedings of the suit or whatever might still remain of the trial; only he cannot claim to be relegated to the position that he occupied at the commencement of the trial.<sup>23</sup> The underlying principle is that until the suit is finally decided, the defendant has a right to come in and defend the suit. This rule, therefore, should be liberally construed.<sup>24</sup>

#### 6. WHERE SUMMONS IS NOT SERVED: RULES 2 AND 5

It is a fundamental rule of the law of procedure that a party must have a fair and reasonable opportunity to represent his case. And for that purpose, he must have a notice of the legal proceedings initiated against him. The service of summons on the defendant is, therefore, a condition precedent to a fair trial. If the summons is not served on the defendant or it does not give him sufficient time to represent his case effectively, no decree can be passed against him.<sup>25</sup>

Rule 2 of Order 9 enacts that the suit may be dismissed where the summons is not served on the plaintiff's failure to pay costs for service of summons to defendant or to present copies of the plaint. No such order, however, can be passed in spite of such failure by the plaintiff if the defendant appears in person or by his authorised agent on the day fixed for him to appear. The plaintiff may file a fresh suit even after the dismissal of the suit under Rule 2 in respect of the same cause of action or may apply for an order to set aside such dismissal. And if the court is satisfied that there was sufficient cause for such failure, the court shall set aside such order of dismissal and shall fix a day for proceeding with the trial.<sup>26</sup>

Where the plaintiff fails to apply for a fresh summons for seven days after the summons on the defendant or one of the defendants (where there are two or more defendants) is returned unserved, the court will dismiss the suit as against the defendant or such defendants. But if within that period, the plaintiff satisfies the court that (i) he has failed, in spite of his best efforts to discover the residence of the defendant who has not been served; or (ii) such defendant is avoiding service of

22 R 7

23 *Arjun Singh v Mohindra Kumar*, AIR 1964 SC 993 (1964) 5 SCR 946, 76, 118, 122, 270, 271, 273, 278, 346, 532, 533.

24 *East India Cotton Mfg Co Ltd v S P Gupta*, 1985 DLT 72.

25 See also *supra* Chap 7, *Regum Para v Luiza Matilda Fernandes*, (1984) 2 SCC 595.

26 R 4

process; or (iii) there is any other sufficient cause for extension of time, the court may extend the time for such period as it thinks fit. If the suit of the plaintiff is dismissed by the court within the period of limitation, he can file a fresh suit also.<sup>27</sup>

Where it is not proved that the summons is duly served on the defendant, the court will direct a fresh summons to be issued and served on the defendant.<sup>28</sup> Where it is proved that the summons is duly served on the defendant but there was not sufficient time to enable him to appear and answer on the day fixed in the summons, the court shall postpone the hearing of the suit to a future day and give notice of such day to the defendant.<sup>29</sup> Where the summons is not duly served or is not served in sufficient time due to the plaintiff's default, the court shall order the plaintiff to pay the costs occasioned by such postponement.<sup>30</sup>

## 7. EX PARTE DECREE

### (a) Meaning

An *ex parte* decree is a decree passed in the absence of the defendant (*in absentia*). Where the plaintiff appears and the defendant does not appear when the suit is called out for hearing and if the defendant is duly served, the court may hear the suit *ex parte* and pass a decree against him. Such a decree is neither null and void nor inoperative but is merely voidable and unless and until it is annulled on legal and valid grounds, it is proper, lawful, operative and enforceable like a *bi-parte* decree and it has all the force of a valid decree.<sup>31</sup>

### (b) Remedies

The defendant, against whom an *ex parte* decree has been passed, has the following remedies available to him:

- (1) to apply to the court by which such decree is passed to set it aside: Order 9 Rule 13; or
- (2) to prefer an appeal against such decree: Section 96(2) (or to file a revision under Section 115 where no appeal lies);
- (3) to apply for review: Order 47 Rule 1; or
- (4) to file a suit on the ground of fraud.<sup>32</sup>

27. R. 5.

28. R. 6(1)(b).

29. R. 6(1)(c).

30. R. 6(2).

31. *Chandu Lal Agarwalla v. Khalilur Rahaman*, (1949-50) 77 IA 27. AIR 1950 PC 17; *Raj Lakshmi v. Banamali Sen*, AIR 1953 SC 33; 1953 SCR 154; *Ram Gohinda v. Bhaktabala*, (1971) 1 SCC 387; AIR 1971 SC 664; *Pandurang Ramchandra v. Shantibai Ramchandra*, 1989 Supp (2) SCC 627; AIR 1989 SC 2240.

32. *Rupchand Gupta v. Raghuvanshi (P) Ltd.*, AIR 1964 SC 1889; (1964) 7 SCR 760; *Rani Choudhury v. Surajjit Choudhury*, (1982) 2 SCC 596; AIR 1982 SC 1393, P. Kiran Kumar

The above remedies are concurrent and they can be prosecuted simultaneously or concurrently.<sup>33</sup> "Where two proceedings or two remedies are provided by a statute, one of them must not be taken as operating in derogation of the other."<sup>34</sup>

"Where two proceedings or two remedies are provided by a statute, one of them should not be taken as operating in derogation of the other."<sup>35</sup>

### (c) Setting aside *ex parte* decree: Rule 13

#### (i) Who may apply?

The defendant against whom *ex parte* decree has been passed may apply for setting it aside. Where there are two or more defendants, any one or more of them may also make such application.<sup>36</sup>

The expression "defendant" is wide enough to include a person who is adversely affected by the decree. A purchaser of mortgaged property, hence, may make an application under Order 9 Rule 13 of the Code.<sup>37</sup> But a defendant against whom the suit has been dismissed cannot be said to be "aggrieved" by the decree and cannot apply under this rule.<sup>38</sup>

#### (ii) Where application lies?

An application for setting aside *ex parte* decree may be made to the court which passed the decree. Where such decree is confirmed, reversed or modified by a superior court, an application may be filed in a superior court.<sup>39</sup>

#### (iii) Grounds

This rule requires an application by the defendant to set aside an *ex parte* decree passed against him if there exist sufficient grounds for it

v *A S Khadar*, (2002) 5 SCC 161 AIR 2002 SC 2286.

33. *Bhanu Kumar Jain v. Archana Kumar*, (2005) 1 SCC 787 AIR 2005 SC 626, *Arun Singh v. Mohindra Kumar*, AIR 1964 SC 993 (1964) 5 SCR 946, 76, 118, 122, 270, 271, 273, 278, 346, 532, 533; *Mahesh Yadav v. Rajeshwar Singh*, (2009) 2 SCC 205

34. *Ajudhia Prasad v. Balmukund*, ILR (1866) 8 All 354 (FB), *Rani Choudhury v. Surai Jit Choudhury*, (1982) 2 SCC 596 AIR 1982 SC 1393, *Archana Kumar v. Parendu Prakash*, (2000) 2 MP LJ 491 (FB).

35. *Ajudhia Prasad v. Balmukund* ILR (1866) 8 All 354 (FB)

36. *Sultan Husain v. Satnaram Lal*, AIR 1953 Hyd 191 ILR 1953 Hyd 114. *Bhagaban v. Suleman*, (1973) 39 Cut LT 998

37. *Man Singh v. Dai Chand* AIR 1934 All 163 ILR (1934) 56 All 578, *Santosh Chopra v. Teja Singh*, AIR 1977 Del 110 1976 Raj LR 578

38. (*Matter*) *Nirayanamurti v. (Parankusam) Venkataappa*, AIR 1927 Mad 227

39. *Official Receiver v. Sellamma* AIR 1973 Mys 154

If the defendant satisfies the court that (i) the summons was not duly served; or (ii) he was prevented by any sufficient cause from appearing when the suit was called out for hearing, the court will set aside the decree passed against him and appoint a day for proceeding with the suit.

**(iv) Summons not duly served**

As provided in Rule 6, the suit may proceed *ex parte* against the defendant only when it is proved by the plaintiff to the satisfaction of the court that the defendant did not appear even though the summons was duly served. In that case, an *ex parte* decree may be passed against him. Therefore, if the defendant satisfies the court that the summons was not duly served upon him, the court must set aside the *ex parte* decree passed against him.

**(v) Sufficient cause**

The expression "sufficient cause" has not been defined anywhere in the Code. It is a question to be determined in the facts and circumstances of each case.<sup>40</sup> The words "sufficient cause" must be liberally construed to enable the court to exercise powers *ex debito justitiae*.<sup>41</sup> A party should not be deprived of hearing unless there has been something equivalent to misconduct or gross negligence on his part.<sup>42</sup> Necessary materials should be placed on record to show that the applicant was diligent and vigilant.<sup>43</sup> Improper advice of advocate may be a good ground to set aside *ex parte* decree but it cannot be accepted as a sufficient cause in all cases.

Whether or not it was a sufficient cause would depend upon facts and circumstances of the case.<sup>44</sup> If there are delaying tactics and non-cooperation on the part of the party, he cannot seek indulgence of the court.<sup>45</sup> Where the lower court declines to allow *ex parte* decree to be set aside, the Supreme Court will not interfere with such order.<sup>46</sup> The test

40. *UCO Bank v. Iyengar Consultancy Services (P) Ltd*, 1994 Supp (2) SCC 399, *Payal Ashok Kumar v. Capt. Ashok Kumar*, (1992) 3 SCC 116, *Salil Dutta v. T.M. & M.C. (P) Ltd*, (1993) 2 SCC 185; *Vijay Kumar v. Kamlabai*, (1995) 6 SCC 148.

41. *Ibid*, see also *Shamdasani v. Central Bank of India Ltd.*, AIR 1959 SC 59; *State of W.B. v. Howrah Municipality*, (1972) 1 SCC 366; AIR 1972 SC 749; *East India Cotton Mfg. Co. Ltd. v. S.P. Gupta*, 1985 DLT 22; *G.P. Srivastava v. R.K. Raizada*, (2000) 3 SCC 54. AIR 2000 SC 1221; *Salil Dutta v. T.M. & M.C. (P) Ltd.*, (1993) 2 SCC 185.

42. *Ibid*, see also *Sudha Devi v. M.P. Narayanan*, (1988) 3 SCC 366; AIR 1988 SC 1381.

43. *Vijay Kumar v. Kamlabai*, (1995) 6 SCC 148 at p. 149.

44. *Salil Dutta v. T.M. & M.C. (P) Ltd.*, (1993) 2 SCC 185.

45. *Vijay Kumar v. Kamlabai*, (1995) 6 SCC 148 at p. 149.

46. *Vijay Kumar v. Kamlabai*, (1995) 6 SCC 148.

to be applied is whether the party honestly intended to remain present at the hearing of the suit and did his best to do so.<sup>47</sup>

(vi) "Good cause" and "sufficient cause": Distinction

There is no material difference between the two expressions, "good cause" and "sufficient cause".<sup>48</sup>

(vii) Grounds: Whether exhaustive

The language of the rule is plain, express and unambiguous and the grounds mentioned therein are exhaustive.<sup>49</sup>

(viii) Material date

Material date for deciding "sufficient cause" for non-appearance by the defendant is the date on which *ex parte* decree was passed and not his previous negligence or past defaults. In *G.P. Srivastava v. R.K. Raizada*,<sup>50</sup> the Supreme Court stated:

"The 'sufficient cause' for non-appearance refers to the date on which the absence was made a ground for proceeding *ex parte* and cannot be stretched to rely upon other circumstance anterior in time. If sufficient cause is made out for non-appearance of the defendant on the date fixed for hearing when *ex parte* proceedings initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier" (emphasis supplied)

(ix) Government defaulting party

The words "sufficient cause" cannot be construed differently merely because the defaulting party is a Government or an instrumentality of the State. Such interpretation would violate doctrine of equality enshrined in Article 14 of the Constitution.<sup>51</sup>

But ground realities of life also cannot be ignored. "Whereas a private individual takes a decision one way or the other almost instantaneously,

47 *Arunachala Iyer v. Subramaniam*, AIR 1923 Mad 63; ILR (1923) 46 Mad 60. *UCO Bank v. Iyengar Consultancy Services (P) Ltd.*, 1994 Supp (2) SCC 399. *Paval Ashok Kumar v. Capt. Ashok Kumar* (1992) 3 SCC 116.

48 R. 7, see also *Arjun Singh v. Mohindra Kumar*, AIR 1964 SC 993 (1964) 5 SCR 946, 76, 118, 122, 270, 271, 273, 278, 346, 532, 533.

49 *G.P. Srivastava v. R.K. Raizada*, (2000) 3 SCC 54. AIR 2000 SC 1221. *Ananda Behera v. Nilkamal Behera*, AIR 1975 Ori 173. *Bishan Singh v. Amarjit Singh*, (1975) 77 P.L.R. 825. *Radha Mohan Datt v. Abbas Ali*, AIR 1931 All 294 (1931) 53 All 612, 133 IC 129 (FB).

50 (2000) 3 SCC 54 at p. 57. AIR 2000 SC 1221 at p. 1222.

51 *Union of India v. Ram Charan*, AIR 1964 SC 215 at p. 219. *Municipal Corp'n. of Ahmedabad v. Manish Enterprises Ltd.*, (1992) 2 Guj LR 1252 (1992) 2 Guj L.H. 176.

a democratic Government or a bureaucratic department hesitates and halts, discusses and debates, considers and consults, peeps through papers and files, speaks through notes and drafts, moves horizontally and vertically till at last it gravitates towards a conclusion, unmindful and oblivious of urgency and emergency."<sup>52</sup>

#### (x) Power and duty of court

When an application for setting aside *ex parte* decree is made by the defendant, the court should consider whether the defendant was prevented by "sufficient cause" from appearing before the court when the suit was called out for hearing. If the court finds that there was sufficient cause for non-appearance, it is bound to be set aside the decree. Conversely, if "sufficient cause" is not shown, *ex parte* decree cannot be set aside. "*This right and this duty is a sine qua non of judicial procedure.*"<sup>53</sup> An order setting aside *ex parte* decree is judicial, it must be supported by reasons.<sup>54</sup>

#### (xi) Test

The test which should be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. If the reply is in the affirmative, *ex parte* decree should be set aside but if it is in the negative, *ex parte* decree cannot be recalled.<sup>55</sup>

#### (xii) Precedents

"Sufficient cause" is a question of fact. Each case has to be decided on the facts and in the circumstances before the court and not on precedents.<sup>56</sup>

#### (xiii) Irregularity in service of summons: Effect

The second proviso, as added by the Amendment Act of 1976, however, lays down that the court shall not set aside an *ex parte* decree merely on

52. *Municipal Corpn. of Ahmedabad v. Manish Enterprises Ltd.*, (1992) 2 Guj LR 1252 at p. 1257 (GLH): at p. 182 (per Thakker, J.).

53. *Diwalibai v. Jai Kumar*, AIR 1969 Bom 393 at p. 394 (1969) 71 Bom LR 558. 1969 Mah LJ 421; *G.P. Srivastava v. R.K. Raizada*, (2000) 3 SCC 54.

54. *Mahesh Yadav v. Rajeshwar Singh*, (2009) 2 SCC 205.

55. *UCO Bank v. Iyengar Consultancy Services (P) Ltd.*, 1994 Supp (2) SCC 399, *Payal Ashok Kumar v. Capt. Ashok Kumar*, (1992) 3 SCC 116, *M.K. Prasad v. P. Arumugam*, (2001) 6 SCC 176; *G.P. Srivastava v. P.K. Raizada*, (2000) 3 SCC 54.

56. *Ibid*, see also *Salil Dutta v. T.M. & M.C. (P) Ltd.*, (1993) 2 SCC 185, *Vijay Kumar v. Kamlabai*, (1995) 6 SCC 148.

the ground of irregularity in service of summons in a case where the defendant had adequate notice of the date of hearing of the suit, and had sufficient time to appear and answer the plaintiff's claim.<sup>57</sup>

The Code thus makes distinction between illegality and irregularity. The former goes to the root of the matter and renders the action null and void. The latter, however, does not invalidate the action, unless prejudice has been caused to the person making a complaint.<sup>58</sup> The word "and" in the second proviso to Rule 13 must be read as conjunctive and not disjunctive. Hence, unless both the conditions are satisfied, an *ex parte* decree cannot be set aside.<sup>59</sup>

#### (xiv) Burden of proof

The burden of proof that there was "sufficient cause" for non-appearance is on the defendant. But, it is enough if he proves that he attempted to remain present when the suit was called on for hearing. There may be many proceedings in a court wherein his personal presence may not be necessary.<sup>60</sup>

#### (xv) Sufficient cause: Illustrative cases

The following causes have been held to be sufficient for the absence of the defendant;<sup>61</sup>

- (1) *bona fide* mistake as to the date of hearing;
- (2) late arrival of a train;
- (3) sickness of counsel;
- (4) fraud of the opposite party;
- (5) mistake of pleader in noting wrong date in diary;
- (6) negligence of next friend or guardian in case of minor plaintiff or defendant;
- (7) death of relative of a party;
- (8) imprisonment of party;
- (9) strike of advocates;
- (10) no instructions *pursis* by a lawyer, etc.

#### (xvi) No sufficient cause: Illustrative cases

The following causes, on the other hand, have been held not to be sufficient for absence of the defendant for setting aside an *ex parte* decree;<sup>62</sup>

57. Notes on Clauses, p. 113

58. *Dhirendra Nath v. Sudhir Chandra*, AIR 1964 SC 1300 (1964) 6 SCR 1001

59. *Khagesh Chandra v. Chandra Kanta*, AIR 1954 Ass 183 (FB), *Sunil Poddar v. Union Bank of India* (2008) 2 SCC 326

60. *Rampati Devi v. Chandrika Devi*, AIR 1970 Pat 314

61. For case law, see *Authors' Code of Civil Procedure* (Lawyers' Edn) Vol. III at pp 820-22.

62. For case law, see, *ibid* pp 822-23

- (1) dilatory tactics;
- (2) bald statement of noting wrong date in diary;
- (3) negligence of party;
- (4) counsel busy in other court;
- (5) suit of high valuation;
- (6) absence of defendant after prayer for adjournment is refused;
- (7) hardship of defendant;
- (8) absence to get undue advantage;
- (9) mere thinking that the case will not be called out;
- (10) not taking part in proceedings, etc.

#### (xvii) Limitation

An application for setting aside *ex parte* decree can be made within thirty days from the date of the decree.<sup>63</sup>

#### (xviii) Notice to opposite party

An *ex parte* decree cannot be set aside without issuing notice to the opposite party and without giving him an opportunity of hearing.<sup>64</sup> This is in consonance with the principles of natural justice and fair play.<sup>65</sup>

#### (xix) Procedure

An application under Rule 13 for setting aside *ex parte* decree may be made by the defendant. In case of death of defendant, his legal representatives can also make such application. It should be signed and verified by the party and not by his advocate.<sup>66</sup>

#### (xx) "Upon such terms as the court thinks fit"

The court has a very wide discretion in imposing such terms on the defendant as it thinks fit before setting aside the *ex parte* decree. It may order the payment of costs, or may order the defendant even to deposit the decretal amount in the court in an appropriate case.<sup>67</sup> The

63. Art. 123, Limitation Act, 1963; see also *Panna Lal v. Murari Lal*, AIR 1967 SC 1384: (1967) 2 SCR 757; *Manick Chandra v. Debidas Nandy*, (1986) 1 SCC 512: AIR 1986 SC 446.

64. R. 14.

65. For detailed discussion of natural justice, see, *Authors' Lectures on Administrative Law* (2012) Lecture 6.

66. S 146. See also *supra*, "Who may apply?"

67. *V.K. Industries v. M.P. Electricity Board*, (2002) 3 SCC 159: AIR 2002 SC 1151; *Kumud Lata v. Indu Prasad*, (1996) 11 SCC 195: AIR 1997 SC 34; *N. Karuppan v. M. Sankaran*

discretion, however, must be exercised reasonably and judicially and not arbitrarily or capriciously.<sup>68</sup> If the terms are onerous, or otherwise unreasonable, a superior court can interfere with them.<sup>69</sup> When an *ex parte* decree is set aside on certain conditions and those conditions are

As Rankin, L.J.<sup>77</sup> stated, "I entirely dissent from the view that, if no case is made out under that rule (Rule 13), it is open to the learned Judge to enlarge the rule by talking about Section 151."

It is submitted that this is the correct view.

**(xxiii) Res judicata**

Where an application for setting aside an *ex parte* decree is dismissed, no fresh application would lie if such dismissal is on merits and rule of *res judicata* will apply. But if the dismissal is for default of the appearance or circumstances have been changed, a second application would be maintainable.<sup>78</sup>

**(xxiv) Successive applications**

Successive applications are maintainable only if circumstances have changed, not otherwise.<sup>79</sup>

**(xxv) Execution of decree: Effect**

The fact that an *ex parte* decree has been executed does not disentitle the defendant from applying under Rule 13 to get it set aside. If the decree is set aside restitution can be ordered.<sup>80</sup>

**(xxvi) Decree satisfied: Effect<sup>81</sup>**

**(xxvii) Extent of setting aside *ex parte* decree**

A peculiar situation, however, arises where an *ex parte* decree is passed against all the defendants but summonses are not served to all of them:

*Illustration*

In a suit by A against B, C and D, *ex parte* decree was passed. C and D were not served with summonses while B was served. In an application by C and D, it was held that the decree against B cannot be set aside.<sup>83</sup>

The proviso, however, makes it clear that where the decree is of such a nature that it cannot be set aside as against such defendant only, the court may set it aside against the other defendants also.<sup>84</sup> In the following classes of cases, the decree must be set aside as a whole:

(1) Where the decree is joint and indivisible.

*Illustration*

A, B and C are coparceners of joint Hindu family. They jointly execute a mortgage in favour of X. X files a suit against all of them. Summons is served to C but not to A and B. None of them appears and an *ex parte* decree is passed against all. A and B apply to set aside the *ex parte* decree. Here the decree being one and indivisible, it ought to be set aside against C also.<sup>85</sup>

(2) Where the suit would result in two inconsistent decrees if the decree were not set aside against the other defendants also.

*Illustration*

X sues A and B, joint executors of a promissory note, for the recovery of amount due thereunder. As a matter of fact, B has paid the amount due to X. Summons is served to A alone. None of them appears and an *ex parte* decree is passed against both. B applies to set aside the decree. The decree must be set aside against A also. The reason is that if B succeeds in proving the payment, there will be two inconsistent decrees.<sup>86</sup>

(3) Where the relief to which the applicant is entitled cannot effectively be given otherwise than by setting aside the decree against the other defendants also.

*Illustration*

A files a suit against B, C and D on a mortgage bond and gets an *ex parte* decree against all of them. B alone applies to set it aside. Neither in the mortgage bond nor in the plaint nor in the decree there is any specification of shares and liabilities of the respective defendants. The decree must be set aside as a whole.<sup>87</sup>

(4) Where the decree proceeds on a ground common to all the defendants.

*Illustration*

A sues B and C on a promissory note. B is the principal debtor and C is the surety. An *ex parte* decree is passed against both. B alone applies to set

83 *Kewal Ram v. Ram Lohani*, (1987) 2 SCC 344, AIR 1987 SC 1304.

84 *Mahesh Yadav v. Rajeshwar Singh*, (2009) 2 SCC 205.

85 *Ardra Perashad v. Shree Pershad*, (1900) 5 CWN 58.

86 *Bouri Mal v. Har Kishan Das*, 11 R (1902) 24 All 383.

87 *Bina Bakshi v. Amiruddin*, AIR 1930 Cal 700, (1929) 30 34 CWN 679, 128 IC 182.

aside the decree and shows sufficient cause for his absence. The decree must be set aside against C also inasmuch as the liability of both is based on a common ground.<sup>88</sup>

#### (xxviii) Effect of setting aside *ex parte* decree

The effect of setting aside an *ex parte* decree is that the suit is restored, and the court should proceed to decide the suit as it stood before the decree. The trial should commence *de novo* and the evidence that had been recorded in the *ex parte* proceedings should not be taken into account.<sup>89</sup>

#### (xxix) Hearing of application pending appeal

Mere filing of an appeal in an appellate court against an *ex parte* decree does not take away the jurisdiction of the trial court to entertain and decide an application for setting aside an *ex parte* decree under Order 9 Rule 13. As already stated earlier, two proceedings are different, distinct and independent and there is no possibility of conflict of decision.<sup>90</sup>

#### (xxx) Dismissal of appeal against *ex parte* decree

Where an appeal against an *ex parte* decree has been decided on any ground other than the withdrawal of such appeal, an application to set aside such *ex parte* decree does not lie.<sup>91</sup>

### (d) Appeal

An appeal lies against an order rejecting an application to set aside *ex parte* decree.<sup>92</sup> As stated above, an *ex parte* decree is a decree under Section 2(2) of the Code and, therefore, an aggrieved party can also file an appeal under Section 96(2) of the Code.<sup>93</sup> A controversial and somewhat complicated question of law is: Whether in such cases, the appellate court can only consider the decree passed by the lower court on merits as to whether there were sufficient grounds to pass the decree or whether the appellate court can also consider whether there were suf-

88. *Munshi Ram v. Malava Ram*, AIR 1917 Lah 194; see also *infra*, Or 41 R. 4.

89. *Aziz Ahmed v. I.A. Patel*, AIR 1974 AP 1; ILR 1972 AP 421 (FB); *Ganesh Prasad v. Lakshmi Narayan*, (1985) 3 SCC 53; AIR 1985 SC 964.

90. For detailed discussion, see *supra*, "Remedies".

91. Expln. to R. 13, see also *Rani Choudhury v. Surajjit Choudhury*, (1982) 2 SCC 596; AIR 1982 SC 1393; *Bhulan Rout v. Lal Bahadur*, (2004) 13 SCC 679.

92. *Ram Sarup v. Gaya Prasad*, AIR 1925 All 610; ILR (1926) 48 All 178 (FB); *Dhoba Naik v. Sabi Dei*, AIR 1973 Ori 182.

93. For detailed discussion, see *infra*, "First Appeals", Pt. III, Chap. 2.

ficient reasons for the defendant for non-appearance and the court was not justified in passing an *ex parte* decree against the defendant.

There is a conflict of judicial decisions on this point. One view is that the appellate court can consider only the question whether the decree was wrong in law while the other view is that the appellate court has power to consider whether the lower court was justified in proceeding with the matter *ex parte* and, if the lower court was not right in doing so, to set aside the *ex parte* decree. It is submitted that the latter view appears to be much more acceptable and preferable, particularly when appeal is continuation of suit and rehearing of the matter.

### (e) Revision

An order setting aside an *ex parte* decree is a "case decided" within the meaning of Section 115 of the Code and is, therefore, revisable.<sup>94</sup> A High Court may also exercise supervisory jurisdiction under Article 227 of the Constitution in appropriate cases.<sup>95</sup>

### (f) Review

Since all the remedies against an *ex parte* decree are concurrent, an aggrieved party can also file an application for review if the conditions laid down in Order 47 Rule 1 are satisfied.<sup>96</sup>

### (g) Suit

A suit to set aside an *ex parte* decree is not maintainable. But if an *ex parte* decree is alleged to have been obtained by the plaintiff by fraud, the defendant can file a regular suit to set aside such decree. It is settled law that fraud vitiates the most solemn transactions.<sup>97</sup> In such suits, the onus is on the party who alleges that the *ex parte* decree passed against him was fraudulent.<sup>98</sup>

94. *Ram Sarup v. Gaya Prasad*, AIR 1925 All 610; ILR (1926) 48 All 178 (FB), *Dhoba Naik v Sabi Dei*, AIR 1973 Ori 182, *Mali Ram v. Gayatri Devi*, AIR 1985 Pat 116. For detailed discussion, see *infra*, "Revision", Pt. III, Chap. 9.

95. *Kamta Prasad v Jaggiya*, AIR 1999 All 184.

96. For detailed discussion, see *infra*, "Review", Pt. III, Chap. 8.

97. *Lazarus Estates Ltd v. Beasley*, (1956) 1 QB 702 (1956) 2 WLR 502 (1956) 1 All ER 341 (CA), *S P Chengalvaraya Naidu v Jagannath*, (1994) 1 SCC 1; AIR 1994 SC 853, *Ram Chandra Singh v Samtri Devi*, (2003) 8 SCC 319, *Bhanu Kumar Jain v Archana Kumar*, (2005) 1 SCC 787; AIR 2005 SC 626, *A V Papayya Sastru v Govt. of A P.*, (2007) 4 SCC 221; AIR 2007 SC 1546.

98. Mulla, *Civil Procedure Code* (2007) Vol. II at pp. 588-89; see also *Rupchand Gupta v Raghuvanshi (P) Ltd.*, AIR 1964 SC 1889 (1964) 7 SCR 760.

## CHAPTER 9

# First Hearing

### SYNOPSIS

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### 1. GENERAL

The plaint and written statement constitute "pleadings". The dispute between the parties thus becomes clear. The court thereafter in the light of pleadings of the parties will frame "issues". Order 10 enjoins the court to examine parties with a view to ascertaining matters in controversy in the suit. Order 14 deals with issues. It is the third important stage after presentation of the plaint by the plaintiff and filing of written statement by the defendant. It is known as the "first hearing". Order 15 enables the court to pronounce judgment at the "first hearing" in certain cases.

### 2. FIRST HEARING: MEANING

The expression "first hearing" has not been defined in the Code.

The first hearing of a suit means the day on which the court goes into the pleadings of the parties in order to understand their contentions. As stated above, the machinery of a court is set in motion by the presentation of a plaint, which is the first stage in the suit. The second stage is the filing of the written statement by the defendant. The third important stage in the suit is the framing and settlement of issues and

the day on which such issues are framed is the *first hearing* of the suit.<sup>1</sup> In cases in which no issues need be framed, e.g., a small cause suit, the first hearing would be the day on which the trial starts.<sup>2</sup>

Thus, the day on which the court applies its mind to the case either for framing issues or for taking evidence can be said to be "the first day of hearing of the suit".<sup>3</sup> To put it differently, "first hearing" is the date when, for the first time, the case is "called out for hearing and really gone into" and not the date when the case was fixed for hearing but was not gone into.<sup>4</sup>

In *Siraj Ahmad v. Prem Nath*<sup>5</sup>, the Supreme Court stated, "The date of first hearing of a suit under the Code is ordinarily understood to be the date on which the court proposes to apply its mind to the contentions in the pleadings of the parties to the suit and in the documents filed by them for the purpose of framing the issues to be decided in the suit."<sup>6</sup>

### 3. OBJECT

Order 10 Rule 1 provides that the court shall, at the first hearing of the suit, ascertain from each party or his pleader whether he admits or denies such allegations or facts as are made in the plaint or in the written statement, if any, of the opposite party. After recording admissions and denials, the court shall direct the parties to the suit to settle the matter out of court through conciliation, arbitration, mediation or *Lok Adalat*. If there is no settlement, the case will again be referred to the court.<sup>7</sup>

Rule 2 provides for oral examination of the parties to the suit with a view to elucidating matters in controversy in the suit. The court, thus, ascertains with precision the propositions of law or fact on which the

1. *Sangram Singh v. Election Tribunal*, AIR 1955 SC 425 at p. 431; (1955) 2 SCR 1; *Ved Prakash v. Vishwa Mohan*, (1981) 3 SCC 667 at p. 668. AIR 1982 SC 816 at p. 817, *Sham Lal v. Atme Nand Jain Sabha*, (1987) 1 SCC 222; AIR 1987 SC 197, *Arjun Khiamal Makhijani v. Jamnadas C. Tuliani*, (1989) 4 SCC 612; AIR 1989 SC 1599, *Siraj Ahmad v. Prem Nath*, (1993) 4 SCC 406; AIR 1993 SC 2525; *Mangat Singh v. Satpal*, (2003) 8 SCC 357; AIR 2003 SC 4300.
2. *Sangram Singh v. Election Tribunal*, AIR 1955 SC 425 (1955) 2 SCR 1.
3. *Sham Lal v. Atme Nand Jain Sabha*, (1987) 1 SCC 222 at pp. 225-26. AIR 1987 SC 197 at pp. 200-01, *Arjun Khiamal Makhijani v. Jamnadas C. Tuliani*, (1989) 4 SCC 612 at pp. 625-26. AIR 1989 SC 1599 at pp. 1601-02, *Siraj Ahmad v. Prem Nath*, (1993) 4 SCC 406, *Advaita Nand v. Judge, Small Cause Court*, (1995) 3 SCC 407, *Mangat Singh v. Satpal*, (2003) 8 SCC 357.
4. *Turan Mondal v. Raj Chandra*, AIR 1919 Cal 70; 50 IC 296, *National Insurance Co. Ltd. v. Dharendra Nath*, AIR 1938 Cal 287.
5. (1993) 4 SCC 406; AIR 1993 SC 2525.
6. *Ibid.*, at p. 412 (SCC) at p. 2528 (AIR), see also *Advaita Nand v. Judge, Small Cause Court* (1995) 3 SCC 407.
7. Or. 10 Rr. 1-A-1-C.

parties are at variance and on such questions issues are required to be framed.<sup>8</sup> In other words, the only point of requiring pleadings and issues is to ascertain the real dispute between the parties, to narrow the area of conflict and to see just where the two sides differ<sup>9</sup>, so that no party at the trial is taken by surprise.<sup>10</sup>

#### 4. ISSUE: MEANING

According to the dictionary meaning, "issue" means a point in question; an important subject of debate, disagreement, discussion, argument or litigation.<sup>11</sup> In other words, an issue is that which, if decided in favour of the plaintiff, will in itself give a right to relief; and if decided in favour of the defendant, will in itself be a defence.<sup>12</sup> The point or points on which pleadings contests or contradicts averments or assertions of the other party, which needs determination of a question by a court for one side or the other is an "issue".

#### 5. FRAMING OF ISSUES: ORDER 14 RULE 1

Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other.<sup>13</sup> Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.<sup>14</sup> Each material proposition affirmed by one party and denied by the other shall form the subject-matter of a distinct issue.<sup>15</sup>

#### 6. KINDS OF ISSUES: RULES 1-2

Rule 1(4) enacts that issues are of two kinds: (a) issues of fact; and (b) issues of law.<sup>16</sup> Issues, however, may be mixed issues of fact and law.<sup>17</sup>

8. Or. 14 R. 1(5); see also *Manmohan Das v. Ramdei*, AIR 1931 PC 175; 134 IC 669 (PC); Law Commission's Fifty-fourth Report at p. 141.

9. *J.K. Iron and Steel Co. Ltd. v. Mazdoor Union*, AIR 1956 SC 231 at p. 235.

10. *Katihar Jute Mills Ltd. v. Calcutta Match Works (India) Ltd.*, AIR 1958 Pat 133 at p. 143; *Banke Ram v. Sarasti Devi*, AIR 1977 P&H 158 at p. 162-63; see also, Or. 10 Rr. 3 & 4.

11. *Concise Oxford English Dictionary* (2002) at p. 751, *Chamber's 21st Century Dictionary* (1997) at p. 722.

12. *Howell v. Dering*, (1915) 1 KB 54 (62) (per Buckley, L.J.).

13. R. 1(1).

14. R. 1(2).

15. R. 1(3).

16. Usually issues can be said to be of three types:

(a) issues of fact;

(b) issues of law; and

(c) mixed issues of law and fact.

For detailed discussion, see *supra*, Chap. 2. For Model Issues, see, Appendix C.

17. *Sree Meenakshi Mills Ltd. v. CIT*, AIR 1957 SC 49; 1956 SCR 691, *Mathura Prasad v. Dossibai N.B. Jeejeebhoy*, (1970) 1 SCC 613; AIR 1971 SC 2355.

Rule 2(1) of Order 14 provides that where issues both of law and fact arise in the same suit, notwithstanding that a case may be disposed of on a preliminary issue, the court should pronounce judgment on all issues. But if the court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first, if that issue relates to (i) the jurisdiction of the court; or (ii) a bar to the suit created by any law for the time being in force. For that purpose, the court may, if it thinks fit, postpone the settlement of the other issues until the issues of law have been decided.<sup>18</sup>

## 7. IMPORTANCE OF ISSUES

Issues are the backbone of a suit. The framing of issues, therefore, has a very important bearing on the trial and decision of a case. *Firstly*, it is the issues framed and not the pleadings that guide the parties in the matter of leading evidence.<sup>19</sup> *Secondly*, the court cannot refuse to decide the point on which an issue has been framed and evidence led by the parties, even if the point involved is not mentioned in the pleadings.<sup>20</sup> *Thirdly*, the court should not frame an issue which does not arise in the pleadings.<sup>21</sup> *Fourthly*, the issues must be confined to the material questions of fact or law (*facta probanda*) and not on subordinate facts or evidence by which material questions of fact or law are proved or disproved (*facta probantia*).<sup>22</sup> *Fifthly*, one issue should cover only one fact or law in dispute between the parties.<sup>23</sup> *Finally*, if the case goes in appeal, it must be dealt with by the appellate court on the issues settled for trial.<sup>24</sup> After the amendment in the Code in 1976, all issues should normally be

18. Or. 14 R. 2(2); see also *Major S.S. Khanna v. Brig F.J. Dillon*, AIR 1964 SC 497; (1964) 4 SCR 409; *Cooper Engg. Ltd. v. P.P. Mundhe*, (1975) 2 SCC 661; *Lufthansa German Airlines v. Vij Sales Corpn.*, (1998) 8 SCC 623, *Arun Agarwal v. Nagreeka Exports (P) Ltd.*, (2002) 10 SCC 101, *Abdul Rahman v. Prasony Bai*, (2003) 1 SCC 488; AIR 2003 SC 718; *Good Will Girls High School v. J. Mary Susheela*, (2003) 9 SCC 106, *Krishna Kumar v. Rajendra Singh* (2008) 4 SCC 300.
19. *Sita Ram v. Radha Bai*, AIR 1968 SC 534 at p. 537 (1968) 1 SCR 805, *J.K. Iron and Steel Co. Ltd. v. Mazdoor Union*, AIR 1956 SC 231; (1955) 2 SCR 1315, *Goppulal v. Thakurji Shriji Shriji Dwarakadheeshji*, (1969) 1 SCC 792; AIR 1969 SC 1291.
20. *Victoria Girls' School v. Board of Education*, (1969) 74 CWN 328, *State of Mysore v. R. Anthony Benedict*, (1968) 2 Lab IC 1384, *Ratneshwari Nandan v. Bhagwati Saran*, AIR 1950 FC 142; 1949 FCR 667, *Santosh Hazari v. Purushottam Tiwari*, (2001) 3 SCC 179; AIR 2001 SC 965; *Madhukar v. Sangram*, (2001) 4 SCC 756.
21. *Sita Ram*, AIR 1968 SC 534, *Goppulal v. Thakurji Shriji Shriji Dwarakadheeshji*, (1969) 1 SCC 792 at p. 794; AIR 1969 SC 1291 at p. 1293.
22. *Lekhraj Diddi v. Sawan Singh*, AIR 1971 MP 172 at p. 175.
23. *Snow White Food Product (P) Ltd. v. Sohanlal Bagla*, AIR 1964 Cal 209.
24. *Abdul Sami v. Mohd. Noor*, AIR 1966 All 39, *Madhab Sahu v. Hatkishore Sahu*, AIR 1975 Ori 48 at p. 54.

tried at the suit and decided at one and the same time.<sup>25</sup> It is, therefore, essential to the right decision of a case that appropriate issues should be framed.<sup>26</sup>

In *State of Gujarat v. Jaipalsingh Jaswantsingh Engineers & Contractors*<sup>27</sup>, the High Court of Gujarat stated, "Such framing of issues in the first instance would facilitate the applicant to lead necessary evidence in support of the claim and the reliefs prayed pursuant thereto. In the second instance, it will avail the opponent an opportunity to confront and contradict the particular witness and thereafter to lead the evidence (if he so desires) to bring home the defence pleaded, and in the third instance, enlighten the trial court to test and appreciate the same in proper perspective to enable it to reach a just decision. It is hardly required to be told that issues are the backbone of a suit. They are also the lamp-post which enlightens the parties to the proceedings, the trial court and even the appellate court—as to what is the controversy, what is evidence and where lies the way to truth and justice."<sup>28</sup> (emphasis supplied)

## 8. COURT'S POWER AND DUTY AS TO ISSUES

The duty to frame proper issues rests primarily on the court.<sup>29</sup> The judge must apply his mind and understand the facts of the case before framing issues. But the pleaders appearing for both the parties also should assist the court in framing issues.<sup>30</sup> If proper issues are not framed, the parties may move the court to get the proper issues framed. Issues must be specific and clear and not vague or evasive. The court may examine witnesses or inspect documents before framing issues, to amend the issues, to frame additional issues or to strike out issues that may appear to it to be wrongly framed.<sup>31</sup> Where the parties to a suit agree as to the question of fact or law to be decided between them, they may, by agreement state the same in the form of an issue. If the court is satisfied that the agreement is executed in good faith, it may pronounce the judgment on such issue according to the terms of the agreement.<sup>32</sup>

In framing issues, a great deal depends upon literary skill of the Presiding Officer. Many of them do not possess such skill is a matter

25. *Lufthansa German Airlines v. Vij Sales Corpn.*, (1998) 8 SCC 623; *D.P. Maheshwari v. Delhi Admn.*, (1983) 4 SCC 293; AIR 1984 SC 153; *Kaushiklal Parikh v. Mafatlal Industries Ltd.*, (1995) 1 Guj LH 329; (1995) 1 Guj LR 557.

26. *Pandurang Laxman v. Kaluram Bahiru*, AIR 1956 Bom 254 at pp. 255-56.

27. (1994) 35 (1) Guj LR 258; (1994) 2 Guj LH 403; (1994) 2 Guj CD 474.

28. *Ibid.*, at p. 261 (GLR); 406 (GLH).

29. R. 1(5). See also *Bhaskar v. Narandas*, AIR 1956 Bom 608 at p. 609; *Haridas Mundhra v. Indian Cable Co. Ltd.*, AIR 1965 Cal 369 at pp. 370-71.

30. *Bhaskar v. Narandas*, AIR 1956 Bom 608.

31. Rr. 4 & 5. See also *Hiralal v. Badkulal*, AIR 1953 SC 225; 1953 SCR 758.

32. Rr. 6 & 7.

of fact and a ground reality. Hence, if on a fair reading, it is possible to ascertain what was intended to be conveyed, appellate court should not interfere with the decision.<sup>33</sup>

### 9. MATERIALS FOR FRAMING ISSUES: RULE 3

The court may frame issues from all or any of the following materials:

- (a) allegations made on oath by the parties, or by any persons present on their behalf, or statements made by the pleaders appearing for the parties;
- (b) allegations made in the pleadings or in answers to interrogatories; and
- (c) documents produced by the parties.<sup>34</sup>

### 10. OMISSION TO FRAME ISSUES

Even though it is the duty of the court to frame proper issues, mere omission to frame an issue is not *necessarily* fatal to the suit. Omission to frame an issue is an *irregularity* which may or may not be a *material* one. If such omission affects the disposal of the suit on merits, the case must be remanded to the trial court for a fresh trial. On the other hand, where the parties went to trial with full knowledge that a particular point was at issue, they have not been prejudiced and substantial justice

done in the proceedings.

- (2) Where there are two or more defendants and any one of them admits the claim of the plaintiff, the court may pronounce judgment against such defendant. (On such pronouncement of judgment, a decree shall follow.) A suit will then proceed against other defendants.<sup>37</sup>
- (3) Where the summons has been issued for the final disposal of the suit and either party fails without sufficient cause to produce the evidence on which he relies.<sup>38</sup>
- (4) Where a party or his pleader makes certain admissions of facts which are sufficient to dispose of the case.<sup>39</sup>
- (5) Where after the issues have been framed, the court is satisfied that no further argument or evidence is required.<sup>40</sup>

37. R. 2. See also *Sidh Nath v. Roop Rani*, AIR 1977 All 286 at pp. 294-95.

38. R. 4. See also *Sangram Singh v. Election Tribunal*, AIR 1955 SC 425.

39. *Kundibai v. Vishinji Hotchand*, AIR 1947 Sind 105; *Siddik Mahd. Shah v. Saran*, AIR 1930 PC 57 at p. 1; *Heeralal v. Kalyan Mal*, (1988) 1 SCC 278; AIR 1998 SC 618, see also *infra*, Or. 12, Chap. 10.

40. R. 3. See also *Sangram Singh v. Election Tribunal*, AIR 1955 SC 425 at p. 431 (AIR); *Bettiah Estate v. Bhagwati Saran*, AIR 1993 All 2.

# CHAPTER 10

## Discovery, Inspection and Production of Documents

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## 1. GENERAL

After the plaint has been presented by the plaintiff and the written statement by the defendant in court, it may appear either to the plaintiff or to the defendant that the nature of his opponent's case is not sufficiently disclosed in his pleadings. He is entitled to know beforehand all *material facts* constituting the case of the opposite party and all *documents* in his possession or power relevant to the issue in the suit with a view to maintain his case or to meet with, impeach or destroy the case of his adversary at the hearing.

This does not, however, mean that a party to a suit has a right to know beforehand the *evidence* of his opponent, for if it were allowed, an unscrupulous litigant may try to destroy it so as to defeat the ends of justice.

As stated above, every suit contemplates two sets of facts, namely, (1) the facts which constitute a party's case (*facta probanda*); and (2) the facts by which the said case is to be proved (*facta probantia*). The first set of facts discloses the *nature* of a party's case and the second set forms the *evidence* of his case. A party is entitled to know beforehand only the first set of facts.

The following provisions have been made in the Code for the said purpose:

- (1) Discovery and inspection: Order 11.
- (2) Admissions: Order 12.
- (3) Production, impounding and return of documents: Order 13; and
- (4) Affidavits: Order 19.

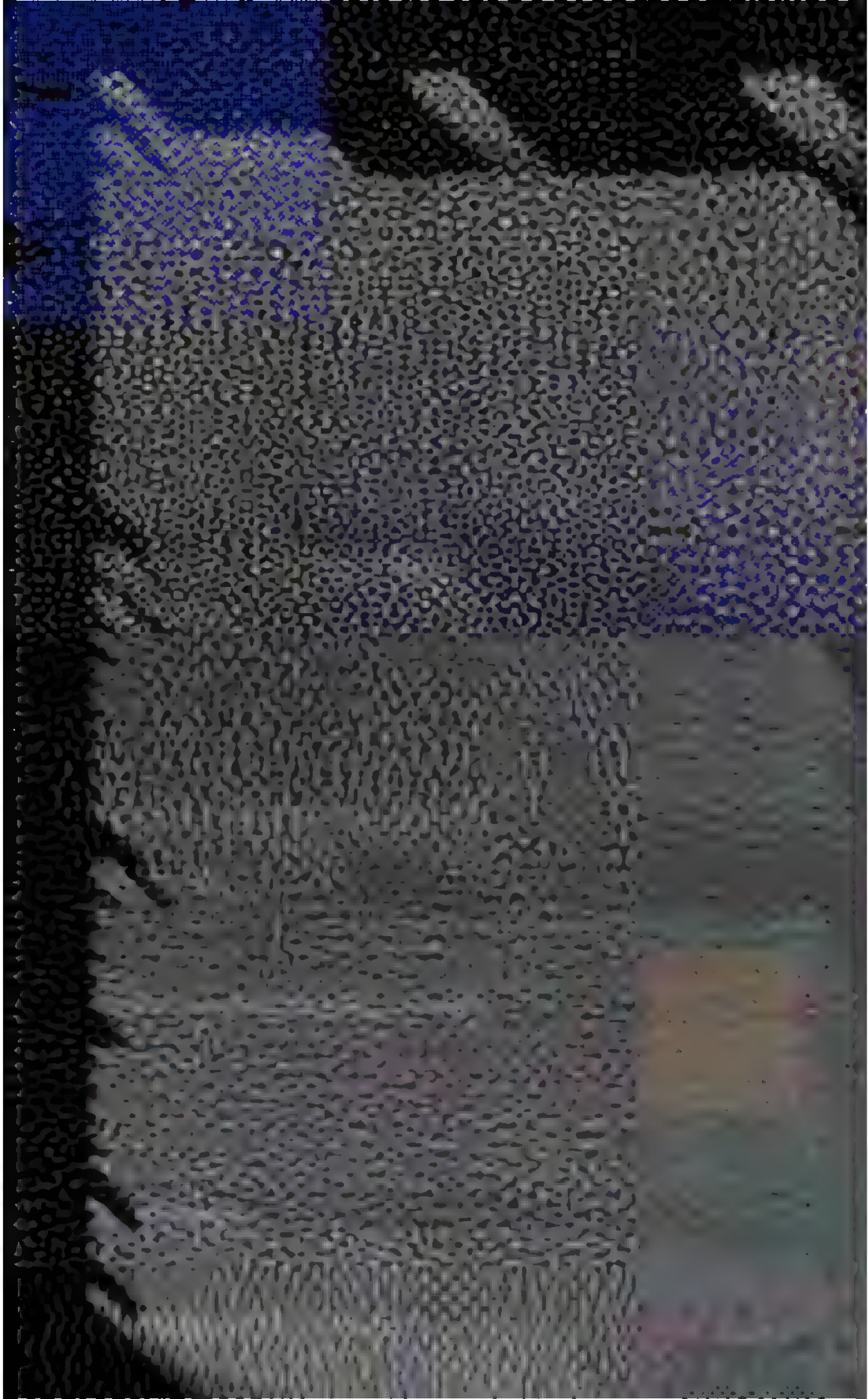
## 2. DISCOVERY AND INSPECTION: ORDER 11

### (a) Discovery

#### (i) Meaning

"Discovery" means to compel the opposite party to disclose what he has in his possession or power. It is thus a compulsory disclosure by a party to an action of facts or documents on which the other side wishes to rely.<sup>1</sup>

1. *Concise Oxford English Dictionary* (2002) at p. 409.



**(iii) Who may administer interrogatories?**

Interrogatories may be administered by one party to a suit to the other party. Thus, a plaintiff may administer interrogatories to a defendant. Likewise, a defendant may administer interrogatories to a plaintiff.<sup>6</sup> In exceptional cases, a plaintiff may administer interrogatories to a co-plaintiff or a defendant may administer interrogatories to a co-defendant.<sup>7</sup>

**(iv) Against whom interrogatories may be allowed?**

Generally, interrogatories may be delivered to a party to a suit. Hence, interrogatories may be allowed against plaintiff or defendant.

It may, however, happen that a person may not be arrayed as a party.

- (i) Interrogatories may be administered in writing with the leave of the court and subject to such conditions and limitations as may be prescribed by it.<sup>13</sup>
- (ii) The particulars of interrogatories proposed to be delivered should be submitted to the court, which shall be decided by the court within seven days from filing of the application.<sup>14</sup>
- (iii) Interrogatories may be administered either by the plaintiff to the defendant or by the defendant to the plaintiff.<sup>15</sup>
- (iv) Interrogatories may also be administered by one plaintiff to another plaintiff or by one defendant to another defendant, provided there is some question or issue between them in the suit, action or proceeding.<sup>16</sup>
- (v) No party can deliver more than one set of interrogatories to the same party without an order by the court.<sup>17</sup>
- (vi) In exceptional cases, a court may allow more than one set of interrogatories to one and the same party.<sup>18</sup>
- (vii) Generally, no leave can be granted to the plaintiff for administering interrogatories until the written statement is filed by the defendant or the time to file the written statement has expired. Similarly, no such leave can be granted to the defendant until he files the written statement.<sup>19</sup>
- (viii) Where a party to a suit is a corporation or a body of persons empowered to sue or be sued, interrogatories may be administered to an officer or member of such corporation or body.<sup>20</sup>
- (ix) Where a party to a suit is a minor or a lunatic, interrogatories may be administered to his next friend or *guardian ad litem*.<sup>21</sup>
- (x) Interrogatories and an affidavit in answer to interrogatories should be delivered in the prescribed form.<sup>22</sup>
- (xi) Interrogatories shall be answered by affidavit to be filed within ten days after the service of the interrogatories or within such period as the court may allow.<sup>23</sup>
- (xii) Interrogatories must relate to or have reasonable nexus with any matter in question in the suit.<sup>24</sup>

13 S 30, Or 11 R 1.

14 R. 2, see also *Prem Sukh v Indro Nath*, ILR (1891) 18 Cal 420 (FB), *Sham Kishore v Shoshilbhoosun*, ILR (1880) 5 Cal 707.

15 R 1, see also *Shaw v. Smith*, (1886) 18 QB 193 (CA), *Molloy v Kilby*, (1880) 15 Ch D 162 (CA)

16 *Ibid*

17 R 1

18 R 1

19 *Cashin v Craddock*, (1876) 2 Ch D 140, *Union Bank of London v Manby* (1879) 13 Ch D 239

20 R 5

21 R 23

22 Rr 4, 8, 9, 10

23 R 8

24 Rr 6, 7

- (xiii) Interrogatories must be as to question of fact and not as to conclusions of law, inferences of facts or construction of documents.<sup>25</sup>
- (xiv) Interrogatories which do not relate to any matter in question in the suit should be deemed to be irrelevant.<sup>26</sup>
- (xv) Interrogatories cannot be allowed at a premature stage.<sup>27</sup>
- (xvi) Interrogatories may be objected *inter alia* on the ground that they are vexatious, scandalous, irrelevant, unreasonable, not *bona fide* to the questions raised in the suit, injurious to public interest, "fishing" in nature, etc.<sup>28</sup>
- (xvii) Interrogatories may be set aside on the ground that they have been administered unreasonably or vexatiously, or struck off on the ground that they are prolix, oppressive, unnecessary or scandalous.<sup>29</sup>
- (xviii) Generally, the costs of the interrogatories shall be borne by the party administering the interrogatories. But the court may direct the party at fault to pay the costs of the interrogatories irrespective of the result of the suit.<sup>30</sup>
- (xix) Any party may, at the trial of the suit, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories.<sup>31</sup>
- (xx) Where any person fails to comply with an order to answer interrogatories, his suit can be dismissed if he is a plaintiff, or his defence can be struck off if he is a defendant.<sup>32</sup>

#### (viii) Interrogatories which may be allowed

As a general rule, interrogatories can be allowed whenever the answers to them will serve either to prove the case of the party administering the interrogatories or to destroy the case of his adversary. The right is a valuable one and the party should not lightly be deprived of that right.<sup>33</sup> The power of interrogatories, therefore, should not be confined within narrow technical limits and must be exercised liberally so as to shorten litigation, save expenses and serve the ends of justice.<sup>34</sup> Interrogatories must be directed to facts relevant to "any matters in issue".<sup>35</sup> They need

25. *Nittomoye Dassee v. Soobul Chunder Law*, ILR (1895) 23 Cal 117; *Model Farm Dairies (Bournemouth) Ltd. v. Newman*, 1943 KB 5, (1942) 2 All ER 445 (CA).

26. R. 6, 7.

27. R. 20.

28. Rr. 6, 7.

29. Rr. 6, 7.

30. R. 3.

31. R. 22.

32. R. 11.

33. *Ramlalsao v. Tansingh*, AIR 1952 Nag 135 at p. 137; ILR 1952 Nag 650.

34. *Ibid.*

35. *Raj Narain v. Indira Nehru Gandhi*, (1972) 3 SCC 850 at p. 861; AIR 1972 SC 1302 at p. 1309; *Delhi Vanaspathi Syndicate v. K.C. Chawla*, AIR 1983 J&K 65.

not be directed to the facts directly in issue. It is sufficient if they are relevant to the matters in question in the suit.<sup>36</sup>

Thus, the author of an article published in a newspaper may be asked to answer an interrogatory like, "Was not the article published in the newspaper and set out in the plaint intended to apply to the plaintiff?"

Similarly, if a defendant denies that he wrote a material document, he may be asked if other documents produced by him were in his handwriting even though such documents had nothing to do with the question involved in the suit, but will be used for comparison of handwriting of the defendant.

Interrogatories cannot be disallowed on the ground that the party interrogating has other means of proving the facts in question, since one of the purposes of interrogatories is to obtain admissions from the opposite party.<sup>37</sup>

#### (ix) Interrogatories which may not be allowed

The procedure for interrogatories, however, in a given case is likely to be abused. Hence, there must be certain limits to the exercise of the said right. As a rule, the power must be exercised with considerable care and caution so that it may not become oppressive and be used for an improper purpose by the other side.

Interrogatories may not be allowed in the following circumstances:

- (i) Interrogatories for obtaining discovery of facts which constitute exclusively the evidence of the case of his adversary. "The purpose of interrogatories is not to enable a litigant to come into court knowing how his opponent is going to prove his case."<sup>38</sup> Thus, where in a suit for damages, the defendant wanted the plaintiff to state as to how he estimated the damages to the amount of Rs 13,000 mentioned in the plaint, it was held that the plaintiff was not bound to answer it.
- (ii) Interrogatories as to any confidential and privileged communications between a party and his legal advisers.<sup>39</sup>
- (iii) Interrogatories which would involve disclosures injurious to public interest.

36 *Howel Morgan, In re*, (1888) 39 Ch D 316 (CA), *Jamaitrai Bishansarup v Rai Bahadur Motilal*, AIR 1960 Cal 536, *M.L. Sethi v R.P. Kapur*, (1972) 2 SCC 427 AIR 1972 SC 2379

37 *Attorney General v Gaskill*, (1882) 20 Ch D 519, *Jamaitrai Bishansarup v Rai Bahadur Motilal*, AIR 1960 Cal 536 at p. 538, *Nishi Prem v Javed Akhtar* AIR 1988 Bom 222

38 *Knapp v Harvey*, (1911) 2 KB 725 at p. 732 (CA), *M.L. Sethi v R.P. Kapur* (1972) 2 SCC 427 at p. 431

39 Ss. 121-129, Evidence Act, 1872.

- (iv) Interrogatories which are scandalous, irrelevant or not *bona fide* for the purpose of the suit or not sufficiently material at that stage.<sup>40</sup>
- (v) Interrogatories which are really in the nature of cross-examination.<sup>41</sup>
- (vi) Interrogatories on questions of law.
- (vii) Interrogatories which are "fishing" in nature. In other words, the interrogatories must refer to some definite and existing state of circumstances and should not be put merely in the hope of discovering something which may help the party interrogating to make out some case or with the object of plugging a loophole.<sup>42</sup>
- (viii) Any interrogatories may be set aside on the ground that they have been administered unreasonably or vexatiously, or struck off on the ground that they are prolix, oppressive, unnecessary or scandalous.<sup>43</sup>

#### (x) Non-compliance: Effect

Where any person omits to answer interrogatories, the party administering interrogatory may obtain an order from the court requiring him to answer by affidavit or by oral examination (*viva voce*).<sup>44</sup>

#### (xi) Appeal

An order granting or rejecting prayer for interrogatories is neither a "decree" nor an appealable order. No appeal, therefore, lies against such order.

#### (xii) Revision

Though an order granting or refusing interrogatories may be said to be a "case decided" under Section 115 of the Code, since it is in the discretion of the court to allow or disallow interrogatories, the High Court normally does not interfere with such order unless it is clearly wrong or illegal.<sup>45</sup>

40. Rr 1, 6.

41. R. 1; *Raj Narain v. Indira Gandhi*, (1972) 3 SCC 850; *Bhagwandas Parashram v. Burjorji Ruttonji Bomonji*, ILR (1913) 37 Bom 347: 17 IC 152.

42. *Ali Kader v. Gobind Dass*, ILR (1890) 17 Cal 840, *Hennessy v. Wright* (No. 2), (1888) 24 QB 445 (CA); *Ganga Devi v. Krushna Prasad*, AIR 1967 Ori 19; ILR 1964 Cut 951.

43. R. 7. 44. R 11.

45. *Kartick Chandra v. Amal Kumar*, (1964) 68 CWN 804; *Raj Mohan v. Maharaja Srila Sriyukha Kirit*, AIR 1961 Trip 23; *Shyamal Kumar v. Godavari Devi*, AIR 1977 NOC 120: 1976 BBCJ 344.

### (c) Discovery of documents: Rules 12-14

#### (i) Nature and scope

Discovery is of two kinds, namely: (i) discovery by interrogatories; and (ii) discovery of documents. Generally speaking, a party is entitled to inspection of all documents which do not themselves constitute exclusively the other party's evidence of his case or title. If a party wants inspection of documents in the possession of the opposite party, he cannot inspect them unless the other party produces them. The party wanting inspection must, therefore, call upon the opposite party to produce the document. And how can a party do this unless he knows what documents are in the possession or power of the opposite party? In other words, unless the party seeking discovery knows what are the documents in the possession or custody of the opposite party which would throw light upon the question in controversy, how is it possible for him to ask for discovery of specific documents? Rule 12, therefore, enables a party without filing an affidavit to apply to the court for the purpose of compelling his opponent to disclose the documents in the possession or power, relating to any matter in question in the suit.<sup>46</sup>

If the court makes an order for discovery, the opposite party is bound to make an affidavit of documents and, if he fails to do so, he will be subject to the penalties specified in Rule 21. An affidavit of documents shall set forth all the documents which are, or have been, in his possession or power relating to the matter in question in the proceedings. And as to the documents which are not, but have been in his possession or power, he must state what has become of them and in whose possession they are, in order that the opposite party may be enabled to get production from the persons who have possession of them.<sup>47</sup>

After he has disclosed the documents by affidavit, he may be required to produce for inspection such of the documents as he is in possession of and as are relevant. The documents sought to be discovered need not be admissible in evidence in the enquiry or proceedings. It is sufficient if the documents would be relevant for the purpose of throwing light on the matter in controversy. Every document which will throw any light on the case is a document relating to a matter in dispute in the proceedings, though it might not be admissible in evidence. In other words, a document might be inadmissible in evidence yet it may contain information which may either directly or indirectly enable the party seeking discovery either to advance his case or damage the adversary's case or which may lead to a trial of enquiry which may have either of these two consequences. But if the documents are irrelevant or immaterial to the

46 *M I. Sethi v. R P. Kapur* (1972) 2 SCC 427

47 *Ibid*

question in controversy or the prayer is made with a view to delay the proceedings, the application will be rejected.<sup>48</sup>

The word "document" in this context includes anything that is written or printed, no matter what the material may be, upon which the writing or printing is inserted or imprinted.<sup>49</sup>

## (ii) Object

The object of this procedure is twofold: (i) *firstly*, to secure, as far as possible, the disclosure on oath of all material documents in possession or power of the opposite party under the sanction of penalties attached to a false oath; and (ii) *secondly*, to put an end to what might otherwise lead to a protracted enquiry as to the material documents actually in possession or power of the opposite party.<sup>50</sup>

Thus, this procedure (a) elicits admissions; (b) obviates necessity of leading lengthy evidence; and (c) expedites trial of suits and thereby assists courts in administration of justice.<sup>51</sup>

## (iii) Who may seek discovery?

A party to a suit may apply to the court for an order of discovery. This can be done either by filing an affidavit or otherwise. If the court makes an order of discovery, the opposite party must in an affidavit set forth all the documents which are or have been in his possession, custody or power.<sup>52</sup>

## (iv) Against whom discovery may be ordered?

An order of discovery may be made against a person who is a party to the suit.<sup>53</sup> Where a suit is instituted by a nominal plaintiff, e.g. *benamidar*, the person or persons actually interested may be ordered to give discovery.<sup>54</sup>

48. *Central Bank of India v. Shivam Udyog*, (1995) 2 SCC 74: AIR 1995 SC 711.

49. *M L. Sethi v. R.P. Kapur*, (1972) 2 SCC 427 at pp. 431-32: AIR 1972 SC 2379 at pp. 2382-83.

50. *Rameswar Narayan v. Rikhanath Koeri*, AIR 1920 Pat 131 at p. 137; *Lajpat Rai v. Tej Bhan*, AIR 1957 Punj 14 at p. 15.

51. *Raj Narain v. Indira Gandhi* AIR 1972 All 41; *United Bank of India Ltd. v. Nederlandsche Standard Bank*, AIR 1962 Cal 325.

52. R. 12.

53. *Ram Sewak v. Hussain Kamil Kidwai*, AIR 1964 SC 1249; (1964) 6 SCR 238. *Gopaldas Modi v. Hansraj*, AIR 1932 Cal 72: ILR (1932) 58 Cal 1091; 134 IC 935.

54. *James Nelson & Sons, Ltd. v. Nelson Line (Liverpool) Ltd.*, (1906) 2 KB 217 (CA); *Willis & Co. v. Baddeley*, (1892) 2 QB 324.

**(v) Conditions**

Discovery of documents may be ordered by a court if the following conditions are satisfied:

- (i) It is necessary for fair disposal of suit; or
- (ii) For saving costs.<sup>55</sup>

**(vi) Objection against discovery**

Discovery may be objected on the ground that it is not necessary or not necessary at that stage of the suit.<sup>56</sup> An objection or reason against discovery should be taken clearly and expressly in the affidavit. It is not enough to state that the documents are privileged. It must also be stated how they are privileged so as to enable the court to decide the claim.<sup>57</sup>

**(vii) Admissibility of document**

Discovery may be ordered for a document which is relevant and which may have some bearing on the matter in issue. Such document need to be admissible in evidence.<sup>58</sup>

**(viii) Documents disclosing evidence**

Documents constituting evidence of the party cannot be ordered to be produced. The provision relating to discovery cannot be utilized by the party "to come into court knowing how his opponent is going to prove his case".<sup>59</sup>

**(ix) Privileged documents**

English law recognizes "Crown Privilege". It is based on the well-known doctrine that "public welfare is the highest law" (*salus populi est suprema lex*). Public interest, no doubt, requires justice to be done. But it also requires withholding of documents in certain circumstances.<sup>60</sup>

55. *Majeti Ramachandrayya v Mamidi Buchayya*, AIR 1935 Mad 288, *Union Bank of India v Hemantlal Ranchhodhai Vegad*, AIR 1991 Guj 113.

56. Proviso to R. 12.

57. *National Assn. of Operative Plasters v Smithies*, 1906 AC 434 (1904-07) All ER Rep 961 (HL); *Gardner v. Irvin*, (1878) 4 Ex D 49 (CA), *Mansell v Frency*, 2 J&H 320.

58. *M L Sethi v R P Kapur*, (1972) 2 SCC 427, *Rajkishore Prasad v State of Orissa*, AIR 1979 Ori 96.

59. *M L Sethi v R P Kapur* (1972) 2 SCC 427 *Central India Spg. Wvg & Mfg Co Ltd v GIP Rly Co.*, AIR 1927 Bom 367 (1927) 29 Bom LR 414 135 IC 625.

60. For detailed discussion as to "Crown Privilege", see, *Authors' Lectures on Administrative Law* (2012) Lecture X.

It may, however, be noted that in case of claim of privilege, it is open to the court to inspect the document for deciding the sustainability of the claim. Mere assertion by the opposite party is not final.<sup>61</sup>

#### (x) Oppressive discovery

Discovery may also be resisted on the ground that it is "unduly oppressive" to the party giving discovery. In dealing with the question, the court will bear in mind two conflicting considerations;

- (i) importance of discovery to the person seeking it; and
- (ii) burden imposed on the opposite party giving discovery.<sup>62</sup>

Whether the discovery is oppressive or not is a question of fact and depends upon the circumstances of each case.<sup>63</sup>

#### (xi) Non-compliance: Effect

If a party ordered to produce documents fails to comply with the order, a court may draw an adverse inference that had he produced them, they would have gone against him.<sup>64</sup>

#### (xii) Rules as to discovery

The general rules as to discovery of documents may be summarised as under:

- (i) Any party to a suit may apply to the court for an order directing the other party to make discovery on oath of the documents which are or were in possession, (custody) or power, relating to any matter in question in the suit.<sup>65</sup>
- (ii) Normally, it is at the discretion of the court to grant or refuse discovery of documents.<sup>66</sup>
- (iii) The court may exercise this power at any stage, either of its own motion or on an application of any party and subject to such conditions and limitations as may be prescribed by it.<sup>67</sup>

61. *Ibid.*, see also, Arts. 22(6), 74(2), 163(3), Constitution of India, Ss. 124, 162, Evidence Act.

62. *Halsbury's Laws of England* (4th Edn.) Vol. 13 at p. 77, para 95.

63. *Ibid.*, see also, *Hall v. London & North Western Rly Co.*, (1877) 35 LT 848.

64. *Moti Lal v. Kundan Lal*, AIR 1917 PC 1: 39 IC 964; *Bilas Kunwar v. Desraj*, (1914-15) 42 IA 202; AIR 1915 PC 96: 30 IC 299; *Hiralal v. Badkulal*, AIR 1953 SC 225. 1953 SCR 758.

65. R. 12.

66. *M.L. Sethi v. R.P. Kapur*, (1972) 2 SCC 427; *Ashreddy v. Venkatreddy*, AIR 1958 AP 450: 1958 Andh LT 521.

67. S. 30, Or. 11 R. 14.

- (iv) The court may either refuse or adjourn such application if satisfied that such discovery is not necessary or not necessary at that stage of the suit or make such order as it thinks fit.<sup>68</sup>
- (v) Generally, no order of discovery, inspection or production of documents will be passed by the court on the application of the plaintiff until the written statement is filed by the defendant or the time to file written statement has expired. And no such order will be passed on the application of the defendant until he has filed his written statement.<sup>69</sup>
- (vi) Discovery cannot be ordered by the court if it is of the opinion that it is not necessary either for the fair disposal of the suit or for saving costs.<sup>70</sup>
- (vii) A party against whom an order for discovery of documents has been made by the court is, as a general rule, bound to produce all the documents in his possession or power.<sup>71</sup>
- (viii) A party against whom discovery of documents has been ordered considers that he is entitled to legal protection in respect of a particular document which he has been ordered to produce by the court, he is at liberty to take such objection, or claim privilege.<sup>72</sup>
- (ix) When such privilege is claimed for any document, the court will inspect such document for the purpose of deciding the validity of the claim of privilege, unless the document relates to matters of State.<sup>73</sup>
- (x) Failure to comply with the order of discovery, inspection or production of documents may result in adverse inference against the defaulting party.<sup>74</sup>

#### (d) Inspection of documents: Rules 15-19

Rules 15 to 19 deal with inspection of documents. For the purpose of inspection, documents may be divided into two classes:

- (i) documents referred to in the pleadings or affidavits of parties; and
- (ii) other documents in the possession or power of the party but not referred to in the pleadings of the parties.

As regards the first class of documents, a party to a suit is entitled to inspection. And without intervention of the court every party may give notice in the prescribed form to the other party in whose pleadings they

68 R 12

69 *Union Bank of London v Manby* (1879) 13 Ch D 239

70 R 12

71 R 13

72 R 13.

73 R 19

74 For detailed discussion, see *supra* "Non-compliance Effect"

are referred to, to produce such documents for his inspection.<sup>75</sup> The party to whom such notice is given should, within ten days from the receipt of such notice, give notice to the party claiming such inspection, stating the time and place at which the documents may be inspected and stating his objections, if any, to the production of any of the documents.<sup>76</sup> If he fails to do so, the court may make an order of inspection.<sup>77</sup>

As regards the second class of documents, the party desiring the inspection can only proceed by way of an application to the court along with an affidavit satisfying the court that the document is relevant to the case.<sup>78</sup>

The primary object of Rules 15 to 19 of Order 11 is to place the opposite party in the same position as if the documents had been fully set out in his pleading or in the affidavit.<sup>79</sup>

### (e) Privileged documents

The following classes of documents have been recognised as privileged documents and they are, therefore, protected from production:

- (i) Documents which "of themselves evidence exclusively the party's own case or title".
- (ii) Confidential communications between a client and his legal adviser.<sup>80</sup>
- (iii) Public official records relating to affairs of the State and confidential official communications, if their production would be injurious to public interest.<sup>81</sup>

It may, however, be noted that where, in an application for an order for inspection, privilege is claimed for any document, the court may inspect the document for the purpose of deciding the validity of the claim of privilege, unless the document relates to matters of State.<sup>82</sup>

### (f) Premature discovery: Rule 20

The court is empowered to postpone a premature discovery or inspection.<sup>83</sup> A discovery is premature when the right to discovery depends

75. Rr. 15 & 16; *Ram Sewak v. Hussain Kamil Kidwai*, AIR 1964 SC 1249 at p. 1251: (1964) 6 SCR 238; *M L. Sethi v. R P Kapur*, (1972) 2 SCC 427.

76. R 17.

77. R. 18(1).

78. R 18(2).

79. *Halsbury's Laws of England* (4th Edn.) Vol. 13 at p. 47, para 57. See also *Day v. William Hill (Park Lane) Ltd.*, (1949) 1 All ER 219.

80. Ss. 126, 129, Evidence Act, 1872.

81. Ss. 123, 124, Evidence Act, 1872. See also *State of Punjab v. Sodhi Sukhdev Singh*, AIR 1961 SC 493: (1961) 2 SCR 371.

82. R. 19(2) For detailed discussion see, *Authors' Lectures on Administrative Law* (2012) Lecture X.

83. R. 20; *Bhagyalakshmi Ammal v. Srinivasa Reddiar*, AIR 1960 Mad 510 (1960) 1 MLJ 292; *British India Steam Navigation Co. v. Secy. of State for India*, ILR (1910) 38 Cal 230.

upon the determination of any issue or question in dispute, or for any other reason it is desirable that any issue or question in dispute in a suit should be determined before deciding upon the right to discovery.<sup>84</sup> In such a case, the court may order that that issue or question be determined first and reserve the question as to discovery thereafter. The object behind this provision is to enable the court to decide an issue in a suit, as distinguished from the suit itself.<sup>85</sup> The rule, however, does not apply where discovery is necessary for the determination of such issue or question.<sup>86</sup>

(g) Non-compliance with order of discovery  
or inspection: Rule 21

Where any party fails to comply with any order to answer interrogatories or for discovery or production of documents, if such party happens to be a plaintiff, his suit may be dismissed for want of prosecution, and if he happens to be a defendant, his defence will be struck off and will be placed in the same position as if he had not defended.<sup>87</sup> Such order, however, can be passed only after giving notice and a reasonable opportunity of being heard to the plaintiff or the defendant, as the case may be.<sup>88</sup> If the suit of the plaintiff is dismissed on this ground, he cannot file a fresh suit on the same cause of action.<sup>89</sup>

A reference may be made to an important decision of the Supreme Court in *Babbar Sewing Machine Co. v. Triloki Nath Mahajan*<sup>90</sup>. In that case, the court ordered the defendant to produce certain documents. The defendant did not comply with that order and his defence was, therefore, struck off. At the trial, he was not allowed to cross-examine the witnesses of the plaintiff. The defendant challenged that action.

Before the Supreme Court, two important questions of law were raised: (i) whether the court was justified in striking out the defence of the defendant; and (ii) whether the defendant had no right to cross-examine witnesses of the plaintiff.

84. *Ibid.* see also *Union of India v. Laxminarayan*, AIR 1953 Nag 281 ILR 1953 Nag 88

85. *Ibid.* see also *SSC Examination Board v. Pratibha Ganpatrao*, AIR 1965 Bom 28 ILR 1965 Bom 113. (1964) 66 Bom LR 569, *Ahmedbhoy Hubibbhoy v. Valeebhoy Cassumbhoy*, ILR (1882) 6 Bom 572

86. *Majeti Ramachandrayya v. Mamudi Buchayya*, AIR 1935 Mad 288 *Ramakrishniah v. Satyanandam*, AIR 1932 Mad 284, *SSC Examination Board v. Pratibha Ganpatrao*, AIR 1965 Bom 28 ILR 1965 Bom 113 (1964) 66 Bom LR 569, *Nalini Ranjan v. Martin & Co.*, AIR 1951 Cal 39

87. R 21(1) See also *Modula India v. Kamakshya Singh*, (1988) 4 SCC 619

88. *Ibid.*

89. R 21(2) See also *Modula India v. Kamakshya Singh*, (1988) 4 SCC 619

90. (1977) 4 SCC 188 AIR 1978 SC 1436

Setting aside the decision, the court held that the stringent provisions of Order 11 Rule 21 should not be lightly invoked and must be applied only in extreme cases as a last resort.

Referring to a number of English and Indian decisions, A.P. Sen, J. made the following observations, which, it is submitted, lay down correct law on the point:

"Even assuming that in certain circumstances, the provisions of Order 21 Rule 21 must be strictly enforced, it does not follow that a suit can be lightly thrown out or a defence struck out, without adequate reasons. The test laid down is whether the default is wilful. In the case of a plaintiff, it entails in the dismissal of the suit and, therefore, an order for dismissal ought not be made under Order 21 Rule 21, unless the court is satisfied that the plaintiff was wilfully withholding information by refusing to answer interrogatories or by withholding the documents which he ought to discover. In such an event, the plaintiff must take the consequence of having his claim dismissed due to his default, i.e. by suppression of information which he was bound to give. In the case of the defendant, he is visited with the penalty that his defence is liable to be struck out and to be placed in the same position as if he had not defended the suit. *The power for dismissal of a suit or striking out of the defence under Order 12 Rule 21, should be exercised only where the defaulting party fails to attend the hearing or is guilty of prolonged or inordinate and inexcusable delay which may cause substantial or serious prejudice to the opposite party.*" (emphasis supplied)<sup>91</sup>

### 3. ADMISSIONS: ORDER 12

#### (a) Nature and scope

Section 58 of the Evidence Act declares that the facts admitted need not be proved. Admissions may be made before the suit or after the filing of the suit. The object of obtaining admissions is to do away with the necessity of proving facts that are admitted; and the judgment and decree may be passed on such admissions.<sup>92</sup> As it has been said, "What a party himself admits to be true may reasonably be presumed to be so."<sup>93</sup>

The adoption of the procedure laid down in Order 12 (Admissions by Notice) results in saving the costs of such proof and in cheapening and shortening litigation.<sup>94</sup>

91. *Ibid*, at p. 193 (SCC). at p. 1439 (AIR), see also *Modula India v. Kamakshya Singh*, (1988) 4 SCC 619; AIR 1989 SC 162.

92. Or. 12 R. 6; see also *Malwa Strips (P) Ltd. v. Jyoti Ltd.*, (2009) 2 SCC 426; *Karam Kapahi v. Lal Chand Public Charitable Trust*, (2010) 4 SCC 753. AIR 2010 SC 2077.

93. *Slatterie v. Pooley*, (1840) 6 M&W 664 at p. 669; 10 LJ Ex 8; see also *Chandra Kumar v. Narpal Singh*, (1906-07) 34 IA 27; ILR (1907) 29 All 184 (PC).

94. *Karam Kapahi v. Lal Chand Public Charitable Trust*, (2010) 4 SCC 753 AIR 2010 SC 2077.

### (b) Object

As seen above, the primary object of admission is to dispense with proof. The Select Committee stated:

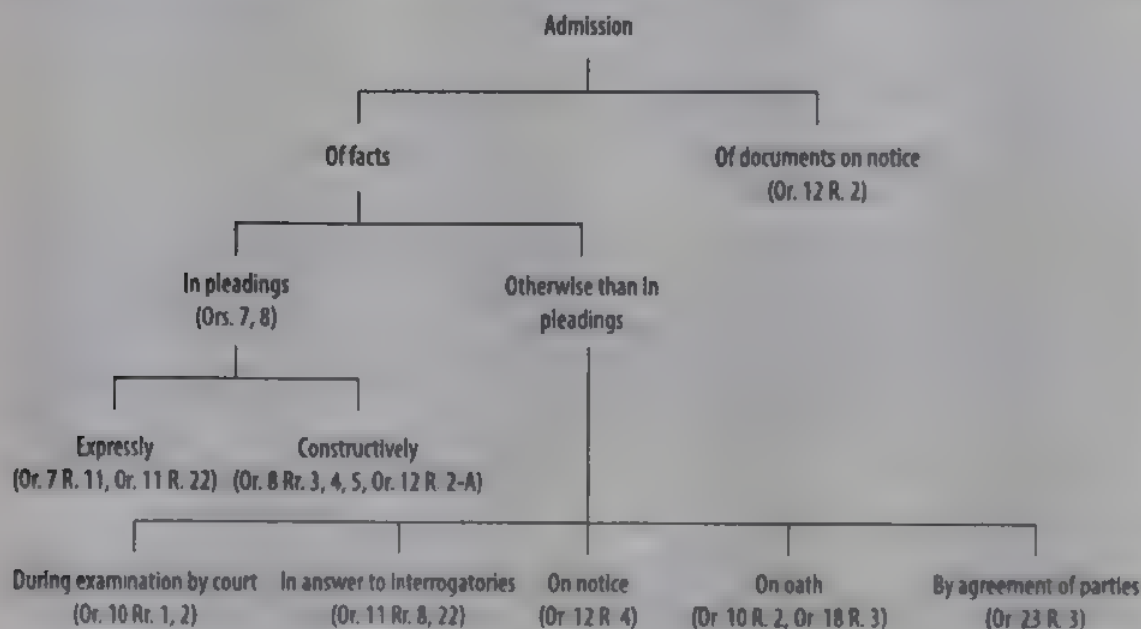
"The Committee think the practice of admission may with advantage be extended to facts as well as to documents. The procedure is not compulsory but its adoption would result in cheapening and expediting litigation, and it is hoped that its use will be encouraged by the courts."

### (c) Importance

The importance of admission cannot be underestimated. It is the best and the strongest piece of evidence since the facts admitted need not be proved. It saves time, expenses and expedites trial. What a party admits to be true should be presumed to be true. No exception can be taken to this proposition.<sup>95</sup>

### (d) Kinds of admissions

Admissions are of different kinds.<sup>96</sup> The following table shows various kinds of admissions that may be made after the suit is filed:



95. *Slatterie v Pooley*, (1840) 6 M&W 664; 10 LJ Ex 8 151 ER 570, *Australian Widows' Fund Life Assurance Society v. National Mutual Life Assn. of Australasia Ltd.*, AIR 1914 PC 220, *Siddik Mohd. Shah v. Saran*, AIR 1930 PC 57. 121 IC 204, *Uttam Singh Duggal & Co. Ltd. v. United Bank of India*, (2000) 7 SCC 120 AIR 2000 SC 2740 *Karam Kapahi v. Lal Chand Public Charitable Trust*, (2010) 4 SCC 753 AIR 2010 SC 2077

96. *Uttam Singh Duggal & Co. Ltd. v. United Bank of India* (2000) 7 SCC 120 AIR 2000 SC 2740, *Karam Chand v. Lal Chand Public Charitable Trust*, (2010) 4 SCC 753 AIR 2010 SC 2077

**(e) Conclusiveness of admission**

An admission is not conclusive as to the truth of the matter stated therein. It is only a piece of evidence, the weight to be attached to such admission should depend upon circumstances under which it was made. It can be shown to be erroneous or untrue.<sup>97</sup>

**(f) Admission should be taken as a whole**

It is well-settled that an admission must be taken as a whole or not at all. It is not open to a court to accept a part of it and reject the rest.<sup>98</sup>

But where one portion of the claim was admitted and the other portion was denied, and both the portions were severable, it was held that the plaintiff could ask for a judgment on the portion admitted by the defendant.<sup>99</sup>

**(g) Notice to admit case: Rule 1**

Any party to a suit may give notice in writing that he admits the whole or any part of the case of the other side.<sup>100</sup>

**(h) Notice to admit documents: Rules 2-3-A, 8**

After discovery and inspection, either party may call upon the other party to admit within seven days from the date of the service of the notice in the prescribed form, the genuineness of any document.<sup>101</sup> In case of refusal or neglect to admit any document even after notice, the costs of proving them shall be paid by the party so neglecting or refusing, whatever may be the result of the suit, unless the court otherwise directs.<sup>102</sup>

Every document which a party is called upon to admit, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of that party or in reply to the notice to admit documents, shall be deemed to be admitted except as against a person under disability. The court may, however, in its discretion and after recording reasons, require any document so admitted to be proved otherwise than by such admission.<sup>103</sup>

97. *Nagubai Ammal v. B. Shama Rao*, AIR 1956 SC 593 at p. 600; 1956 SCR 451, *Geo-Group Communications Inc. v. IOL Broadband Ltd.*, (2010) 1 SCC 562.

98. *Motabhoj Mulla Essabhoj v. Mulji Haridas*, (1914-15) 42 IA 103; AIR 1915 PC 2; 29 IC 223; *D A V. College v. Padmanabha Radhy*, (1988) 1 SCC 653; AIR 1988 SC 612.

99. *Premasuk Das v. Udairam*, AIR 1918 Cal 467; ILR (1918) 45 Cal 138; *Sooltan Ali v. Chand Bibee*, (1868) 9 Suth WR 130, *Uttam Singh Duggal & Co. Ltd. v. United Bank of India*, (2000) 7 SCC 120; AIR 2000 SC 2740.

100. R. 1.

101. Rr. 2, 3, 8.

102. R. 2.

103. R. 2-A(1).

A person unreasonably neglecting or refusing to admit a document may be ordered to pay penal costs to the other side.<sup>104</sup> The court may also call upon any party, on its own motion *suo motu*, to admit any document at any stage of the proceedings.<sup>105</sup>

Admission of documents means admission of facts contained in the documents.<sup>106</sup> But if any document is admitted only for a limited purpose, as, for instance, for dispensing with formal proof of it, it cannot be said that the party thereby accepts the facts stated in the document.<sup>107</sup>

### (i) Notice to admit facts: Rules 4-5

Rules 4 and 5 provide for notice to admit facts. Any party may, by notice in writing, at any time not later than nine days before the day fixed for the hearing, call upon any other party to admit, for the purpose of the suit only, any specific fact or facts, mentioned in such notice. The costs of proving such fact or facts shall be paid by the party refusing or neglecting to admit the same within six days after service of such notice, whatever may be the result of the suit, unless the court otherwise directs. Such admission, however, should be accepted or rejected as a whole and it is not permissible to rely on one part, ignoring the other.<sup>108</sup> Likewise, if admission is made subject to a condition, it must be accepted only with that condition.<sup>109</sup>

### (j) Judgment on admissions: Rule 6

Rule 6 empowers the court to pronounce a judgment upon the admissions made by the parties, without waiting for determination of any other question between the parties.

The object of the rule is to enable a party to obtain a speedy judgment, at least to the extent of the relief to which, according to the admission of the opposite party, he is entitled to. A party can, under this rule, move for a judgment upon the admission made by the opposite party and thus get rid of the portion of the action in which there is no dispute.<sup>110</sup>

104 R 2-A(2)

105 R 3-A

106 *Sitaram v. Santanuprasad*, AIR 1966 SC 1697 at p. 1703; (1966) 3 SCR 527

107. *Lionel Edwards Ltd. v. State of W.B.*, AIR 1967 Cal 191 at p. 194, *Videshwar Pathak v. Budhiram Barai*, AIR 1964 All 345

108 *D A V College v. Padmanabha Reddy*, (1988) 1 SCC 653; AIR 1988 SC 612; *Dudh Nath v. Suresh Chandra*, (1986) 3 SCC 360; AIR 1976 SC 1509

109 *M M. Essabhou v. Mulu Haridas*, AIR 1915 PC 2

110 Statement of Objects and Reasons, see also *Karam Kapahi v. Lal Chand Public Charitable Trust*, (2010) 4 SCC 753; AIR 2010 SC 2077

In the leading case of *Throp v. Holdsworth*<sup>111</sup>, Jessel, M.R. stated, "This rule enables the plaintiff or the defendant to get rid of so much of the action, as to which there is no controversy."

In *Uttam Singh Duggal & Co. Ltd. v. United Bank of India*<sup>112</sup>, the Supreme Court held that where a claim is admitted, the court has jurisdiction to enter a judgment for the plaintiff and to pass a decree on admitted claim. The scope of Rule 6 of Order 12 should not be narrowed down where a party applying for judgment is entitled to succeed on a plain admission of the opposite party.

The power to give judgment under this rule is discretionary and enabling in nature and the party cannot claim it as of right. The court is also not bound to pass a judgment upon admission. If the court is of the opinion that it is not safe to pass a judgment on admissions, or that a case involves questions which cannot be appropriately dealt with and decided on the basis of admission, it may, in the exercise of its discretion, refuse to pass a judgment and may insist upon clear proof of even admitted facts.<sup>113</sup> Moreover, before pronouncing a judgment on admission, the court must be satisfied that the admission is definite and unequivocal.<sup>114</sup> In appropriate cases, a court may also allow a party to explain previous admission.<sup>115</sup>

#### 4. PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS: ORDER 13

##### (a) Nature and scope

The plaintiff must produce in court with the plaint the documents on which he is suing the defendant. He must deliver a list of documents in support of his claim. A summons to a defendant should contain a direction asking him to produce all the documents in his possession or power upon which he intends to rely in support of his claim.

Order 13 deals with production, admission, impounding, rejection and return of documents.

##### (b) Production of documents: Rule 1

Rule 1 of Order 13 requires the parties or their pleaders to produce the documentary evidence on or before the settlement of issues. The object

111. (1876) 3 Ch D 637 at p. 640

112. (2000) 7 SCC 120 at p. 127. AIR 2000 SC 2740 at p. 2743.

113. *Razia Begum v. Sahebzadi Anwar Begum*, AIR 1958 SC 886 at p. 895 1959 SCR 1111; *Karam Kapahi v. Lal Chand Public Charitable Trust*, (2010) 4 SCC 753 AIR 2010 SC 2077.

114. *Gilbert v. Smith*, (1876) 2 Ch D 686, *Razia Begum v. Sahebzadi Anwar Begum*, AIR 1958 SC 886 at p. 895; 1959 SCR 1111

115. *Geo-Group Communications Inc v. IOL Broadband Ltd*, (2010) 1 SCC 562.

underlying this provision is to secure a fair trial of cases, obviate the chances for the parties to adduce forged or manufactured evidence and produce their documents before the court at the earliest opportunity.<sup>116</sup> It also seeks to prevent belated production of documents which may cause prejudice to the other side.<sup>117</sup>

As stated above, the plaintiff must produce in court with the plaint the documents on which he sues and upon which he relies in support of his claim.<sup>118</sup> Similarly, the summons should also contain an order to the defendant to produce all the documents upon which he intends to rely in support of his claim.<sup>119</sup>

Rule 1(1) of Order 13 directs the parties or their pleaders to produce all documentary evidence in original, on or before settlement of issues. Rule 1(2) requires the court to receive those documents.

The object of the rule, however, was not to penalise the parties but merely to prevent belated production of documents so that it might not work injustice to the other side. The power, therefore, clearly clothed the court with discretion to allow production of documents if it was satisfied that good cause was shown.<sup>120</sup> The explanation of delay was not as rigorous as one required under Section 5 of the Limitation Act.

Where the documents were not in the possession of the party and they were produced after obtaining certified copies from Revenue Authorities, refusal of production was held to be unjustified.<sup>121</sup> The court has power to receive any document at a later stage if the genuineness of a document is beyond doubt and it is relevant or material to decide the real issue in controversy.<sup>122</sup> No documents whether public or private which are above suspicion should be excluded if they are necessary for the just decision of a case.<sup>123</sup> The discretion must be exercised judicially and considering the facts and circumstances of each case. The rule must be liberally construed so as to advance the cause of justice.<sup>124</sup>

116. *Parsotim v. Lal Mohar*, (1930-31) 58 IA 254; AIR 1931 PC 143 132 IC 721 (PC)

117. *Madan Gopal v. Mamraj Maniram*, (1977) 1 SCC 669; AIR 1976 SC 461, *Billa Jagan Mohan v. Billa Sanjeeva*, (1994) 4 SCC 659; *Madanlal v. Shyamial*, (2002) 1 SCC 535 AIR 2002 SC 100.

118. Or 7 R 14                      119. Or 5 R 7

120. *Madan Gopal v. Mamraj Maniram*, (1977) 1 SCC 669 at pp. 674-75; AIR 1976 SC 461 at p. 470, *Billa Jagan Mohan v. Billa Sanjeeva*, (1994) 4 SCC 659, *Madanlal v. Shyamial*, (2002) 1 SCC 535 AIR 2002 SC 100

121. *Billa Jagan Mohan v. Billa Sanjeeva*, (1994) 4 SCC 659 at p. 661, *Lalitha J. Rai v. Aithappa Rai* (1995) 4 SCC 244 AIR 1995 SC 1766

122. *Billa Jagan Mohan v. Billa Sanjeeva* (1994) 4 SCC 659

123. *Ibid*; see also *Gopika Raman Roy v. Atal Singh*, (1928-29) 56 IA 119 AIR 1929 PC 99, *Imambandi v. Mutsaddi*, (1917-18) 45 IA 73 AIR 1918 PC 11

124. *Billa Jagan Mohan v. Billa Sanjeeva*, (1994) 4 SCC 659 see also *Gopika Raman Roy v. Atal Singh*, (1928-29) 56 IA 119 AIR 1929 PC 99, *Imambandi v. Mutsaddi* AIR 1918 PC 11 45 IA 73, *Kanda v. Waghlu*, (1949-50) 77 IA 15 AIR 1950 PC 68

In *Babbar Sewing Machine Co. v. Triloki Nath Mahajan*<sup>125</sup>, the Supreme Court stated, "The power for dismissal of a suit or striking out of the defence under Order 11 Rule 21, should be exercised only where the defaulting party fails to attend the hearing or is guilty of prolonged or inordinate and inexcusable delay which may cause substantial or serious prejudice to the opposite party."

This provision, however, does not apply to documents (a) produced for cross-examination of witnesses of the other side; or (b) handed over to a witness merely to refresh his memory.<sup>126</sup>

### (c) Admission of documents: Rules 4-7

Rule 4 provides that on every document admitted in evidence in the suit, the following particulars shall be endorsed: (a) the number and title of the suit; (b) the name of the person producing the document; (c) the date on which it was produced; and (d) a statement of its having been so admitted. The endorsement should be signed by the judge.

The rule as to endorsement must be observed in letter and spirit. In *Sadik Husain Khan v. Hashim Ali Khan*<sup>127</sup>, the Privy Council said, "Their Lordships, with a view to insisting on the observance of the wholesome provisions of these statutes, will, in order to prevent injustice, be obliged in future on the hearing of Indian appeals to refuse to read or permit to be used any document not endorsed in the manner required."

Where a document admitted in evidence in the suit is an entry in a letter-book or a shop-book or other account in current use or an entry in a public record produced from a public office or by a public officer, or an entry in a book or account belonging to a third party, a copy of the entry may be furnished.<sup>128</sup> The documents admitted in evidence shall form part of the record of the suit.<sup>129</sup>

### (d) Return of documents: Rules 7, 9

Documents not admitted in evidence shall be returned to the person producing them.<sup>130</sup>

Rule 9 provides for return of a document to a party producing it after the disposal of the suit or appeal or even during the pendency of the suit provided that the necessary undertaking to produce the original in case it is required is filed, though ordinarily it is not allowed without notice to the other side and without producing certified copy of such document.<sup>131</sup>

125. (1978) 4 SCC 188 at p. 193; AIR 1978 SC 1436 at p. 1439.

126. R. 1(3).

127. (1915-16) 43 IA 212; AIR 1916 PC 27; 36 IC 104 (PC)

128. R. 5.

129. R. 7(1).

130. R. 7.

131. R. 9; see also *Gitabai v. Dayaram Shankar*, AIR 1970 Bom 160.

### (e) Rejection of documents: Rules 3, 6

The court may, after recording reasons, reject, at any stage of the suit, any document which it considers irrelevant or inadmissible.<sup>132</sup> The endorsement on the rejected document should show the particulars mentioned in clauses (a) to (c) of Rule 4(1) above together with the statement of its having been rejected. The said endorsement shall be signed by the judge.<sup>133</sup> The document, thereafter, shall be returned to the person producing it.<sup>134</sup>

### (f) Impounding of documents: Rule 8

Rule 8 enables a court to impound a document. It states that the court may for sufficient cause direct any document, book or exhibit produced before it in any suit to be impounded and kept in the custody of an officer of the court for such period and subject to such conditions as it thinks fit.<sup>135</sup> Whereas Rule 7 provides for return of documents not admitted in evidence Rule 8 deals with documents admitted in evidence. This power may be exercised by the court in case of forgery or apprehension that the document may be destroyed or altered.

## 5. AFFIDAVITS: ORDER 19

### (a) Meaning

Though the expression "affidavit" has not been defined in the Code, it has been commonly understood to mean "a sworn statement in writing made especially under oath or on affirmation before an authorised officer or Magistrate".<sup>136</sup>

Stated simply, an affidavit is a declaration of facts, made in writing and sworn before a person having authority to administer oath. Every affidavit should be drawn up in the first person and should contain only facts and not inferences.<sup>137</sup>

### (b) Essentials

The essential attributes of an affidavit are:

- (i) It must be a declaration made by a person;
- (ii) It must relate to facts;

132 R 3

133 R 6

134 R 7(2)

135 Rr 8-11

136 *M. Veerabhadra Rao v. Tek Chand*, 1984 Supp SCC 571 at pp 580-81 AIR 1985 SC 28  
See also, S. 3(3) General Clauses Act 1897

137 For Model affidavit, see, Appendix H

- (iii) It must be in writing;
- (iv) It must be in the first person; and
- (v) It must have been sworn or affirmed before a Magistrate or any other authorised officer.

### (c) Contents of affidavit

An affidavit should be confined to such facts as the deponent is able to prove to his personal knowledge. Rule 3(1) of Order 19, however, allows the deponent to state such facts in interlocutory applications which are based on belief.

### (d) Evidence on affidavit: Rules 1-3

A court may order that any fact may be proved by affidavit.<sup>138</sup> Ordinarily, a fact has to be proved by oral evidence<sup>139</sup> since affidavits are not included in the definition of "evidence" under Section 3 of the Evidence Act. They can be used as an evidence only if, for sufficient reason, the court invokes the provisions of Order 19 of the Code.<sup>140</sup> Order 19 Rule 1 is a sort of exception to this rule,<sup>141</sup> and empowers the court to make an order that any particular fact may be proved by affidavit, subject, however, to the right of the opposite party to have the deponent produced for cross-examination.<sup>142</sup> If a party desires to controvert the averments contained in the affidavit of the opposite party, he must either file an affidavit-in-reply or cross-examine the deponent. In the absence of this, the court is entitled to come to its own finding.<sup>143</sup>

Affidavits should be confined to such facts as the deponent is able to prove to his personal knowledge, except on interlocutory applications, on which statements of his belief may be admitted.<sup>144</sup> Where an

138. S. 30(c), Or. 19 R. 1; see also *Savithramma v Cecil Naronha*, 1988 Supp SCC 655: AIR 1988 SC 1987.

139. Or. 18 R. 4; see also *Sudha Devi v. M.P. Narayanan*, (1988) 3 SCC 366: AIR 1988 SC 1381.

140. *Sudha Devi v. M.P. Narayanan*, (1988) 3 SCC 366 at p. 368: AIR 1988 SC 1381 at p. 1382.

141. *State of J&K v. Bakshi Gulam Mohammad*, AIR 1967 SC 122 at p. 132: 1966 Supp SCR 401, *B.N. Munibasappa v. Gurusiddaraja Desikendra*, AIR 1959 Mys 139. ILR 1959 Mys 90.

142. R. 2; *Khandesh Spg. & Wvg. Mills Co. Ltd. v. Rashtriya Girni Kamgar Sangh*, AIR 1960 SC 571 at p. 574: (1960) 2 SCR 841; *Pijush Kanti v. Kinnori Mullick*, AIR 1984 Cal 184: (1984) 1 Cal LJ 301: (1984) 88 CWN 615.

143. *Gograj v. State of U.P.*, (1973) 27 FLR 248 (SC); *State of J&K v. Bakshi Gulam Mohammad*, AIR 1967 SC 122: 1966 Supp SCR 401.

144. R. 3. See also *State of Bombay v. Purushottam Jog*, AIR 1952 SC 317 at p. 319: 1952 SCR 674; *Krishan Chander v. Central Tractor Organisation*, AIR 1962 SC 602 (1962) 3 SCR 187; *M. Veerabhadra Rao v. Tek Chand*, 1984 Supp SCC 571.

averment is not based on personal knowledge, the source of information should be clearly disclosed.<sup>145</sup>

There is always a duty on the part of the counsel to advise his client as to the verification of the affidavit. The client should be told to swear only to what he knows to be true. What he believes to be true should be mentioned separately.

Unless affidavits are properly verified and are in conformity with the rules, they will be rejected by the court.<sup>146</sup> But, instead of rejecting an affidavit, a court may give an opportunity to a party to file a proper affidavit.

Ordinarily, interlocutory applications, which do not determine any right finally and conclusively, such as, application for attachment before judgment,<sup>147</sup> interim injunction,<sup>148</sup> appointment of receiver,<sup>149</sup> etc. can be decided on affidavits.<sup>150</sup>

#### (e) False affidavit

Swearing of false affidavit is an offence of perjury punishable under the Indian Penal Code.<sup>151</sup> It is a grave and serious matter and lenient view is not warranted.<sup>152</sup> Where such affidavit is filed by an officer of the Government very strict action should be taken.<sup>153</sup>

145. *Barium Chemicals Ltd. v. Company Law Board*, AIR 1967 SC 295 at p. 319; 1966 Supp SCR 311; *Virendra Kumar v. Jagjiwan*, (1972) 1 SCC 826 at p. 831; AIR 1974 SC 1957 at p. 1961; *Sukhwinder Pal v. State of Punjab*, (1982) 1 SCC 31 at p. 38; AIR 1982 SC 65 at p. 70; *Indian Aluminium Cables Ltd. v. Union of India*, (1985) 3 SCC 284 at pp. 290-91; AIR 1985 SC 1201 at pp. 1205-06; *Shivajirao Nilangekar v. Mahesh Madhav*, (1987) 1 SCC 227.

146. *Ibid*, see also *A K K Nambiar v. Union of India*, (1969) 3 SCC 864 at p. 867; AIR 1970 SC 652 at pp. 653-54; *Savithramma v. Cecil Naronha*, 1988 Supp SCC 655; AIR 1988 SC 1987.

147. See *infra* Chap. 11. 148. *Ibid*. 149. *Ibid*.

150. *Seethi Tirupati v. Bhupathiraju Janikamma*, AIR 1963 AP 445; *Bai Zabukhima v. Amardas Balakdas*, AIR 1967 Guj 214; *Mithailal Gupta v. Inland Auto Finance*, AIR 1968 MP 33.

151. S. 191 IPC.

152. *State v. Shingara Singh*, AIR 1963 Punj 185 (1963) 1 CrLJ 478.

153. *Nanguneri Sri Vanamomalai Ramanuja v. State of T.N.*, 1996 AIHC 204.

# CHAPTER 11

## Interim Orders

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## 1. GENERAL

According to the dictionary meaning, "interim" means "for the time being", "in the meantime", "meanwhile", "temporary", "provisional", "not final", "intervening".<sup>1</sup> The word "interim" when used as a noun means "intervening" and when used as an adjective, it means "temporary" or "provisional".<sup>2</sup> Thus, interim or interlocutory orders are those orders passed by a court during the pendency of a suit or proceeding which do not determine finally the substantive rights and liabilities of the parties in respect of the subject-matter of the suit or proceeding.

"Interlocutory" means, not that which decides the cause, but that which only settles some intervening matter relating to the cause; a

1. *Concise Oxford English Dictionary* (2002) at p 738; *Black's Law Dictionary* (1990) at p 814; PR Aiyar, *Advanced Law Lexicon* (2005) Vol. II at p 2411.

2. *Bank of Maharashtra v M V River Ughese*, AIR 1990 Bom 107 at p 110.

decree or judgment given provisionally during the course of a legal action.<sup>3</sup>

After the suit is instituted by the plaintiff and before it is finally disposed of, the court may make interlocutory orders as may appear to the court to be just and convenient.<sup>4</sup> They are made in order to assist the parties to the suit in the prosecution of their case or for the purpose of protection of the subject-matter of the suit. Courts are constituted for the purpose of doing justice and must be deemed to possess all such powers as may be necessary to do the right and undo the wrong in the course of administration of justice.<sup>5</sup>

Interim orders are necessary to deal with and protect rights of the parties in the interval between the commencement of the proceedings and final adjudication. They enable the court to grant such relief or to pass such order as may be necessary, just or equitable. They also prevent any abuse of process during the pendency of proceedings. Hence, interim or interlocutory proceedings play a crucial role in the conduct of litigation between parties.<sup>6</sup>

Such interim orders under CPC may be summarised thus:

- (i) Payment in Court: Order 24
- (ii) Security for Costs: Order 25
- (iii) Commissions: Order 26
- (iv) Arrest before Judgment: Order 38
- (v) Attachment before Judgment: Order 38
- (vi) Temporary Injunctions: Order 39
- (vii) Interlocutory Orders: Order 39
- (viii) Receiver: Order 40

Let us discuss these provisions in detail.

## 2. PAYMENT IN COURT: ORDER 24

As it is open to the plaintiff to abandon his suit, so also it is open to the defendant in a suit for debt or damages to deposit in court at any stage of the suit such sum of money as he considers a satisfaction *in full* of the plaintiff's claim.<sup>7</sup> The deposited amount shall be paid to the plaintiff on his application unless the court otherwise directs.<sup>8</sup> Such

3. P.R. Aiyar, *Advanced Law Lexicon* (2005) Vol. II at p. 2143; *Concise Oxford English Dictionary* (2002) at p. 739; Justice C.K. Thakker, *Encyclopaedic Law Lexicon* (2009) Vol. II at pp. 2397-403.

4. S. 94(e).

5. S. 151. For detailed discussion, see *infra*, Pt. V, Chap. 4.

6. *Halsbury's Laws of England* (4th Edn.) at p. 243, para 326.

7. Or. 24 Rr. 1, 2; see also *supra*, *Banwari Lal v. Chando Devi*, (1993) 1 SCC 581; *Ruby Sales & Services (P) Ltd. v. State of Maharashtra*, (1994) 1 SCC 531.

8. R. 2.

deposit, however, must be unconditional.<sup>9</sup> No interest shall be allowed to the plaintiff on the sum deposited by the defendant.<sup>10</sup> If such amount is deposited at the stage of final arguments only to save payment of interest, the application can be rejected.<sup>11</sup>

If the plaintiff accepts such sum as payment in full satisfaction of his claim, the court shall record his statement to that effect and pronounce the judgment accordingly.<sup>12</sup> On the other hand, if the plaintiff accepts such payment as satisfaction in part of his claim, he is entitled to prosecute the suit for the balance. But, if ultimately it is found that the deposit was in full satisfaction of the plaintiff's claim, the plaintiff shall pay all costs incurred after such deposit.<sup>13</sup>

#### Illustration

A sues B to recover Rs 15,000. B deposits Rs 10,000 in full satisfaction of the plaintiff's claim. If A accepts the amount as satisfaction in full of his claim, the Court shall pronounce the judgment to that effect. If, on the other hand, A accepts the amount as satisfaction in part only of his claim, he may prosecute his suit for the balance. But if the Court ultimately decides that A is entitled only to Rs 10,000, he will have to pay the costs incurred by B after depositing Rs 10,000 in the Court.

### 3. SECURITY FOR COSTS: ORDER 25

#### (1) Applicability: Rule 1

Rule 1 of Order 25 provides for the taking of security for the costs of the suit. It states that the court may, at any stage of the suit, order the plaintiff to give security for the payment of the costs of the defendant. This is at the discretion of the court.<sup>14</sup> This power may be exercised by the court on an application by a defendant or *suo motu* (on its own motion).

In the following circumstances, however, the court shall make such order:<sup>15</sup>

- (i) where the plaintiff resides outside India or where there are two or more plaintiffs and all of them reside outside India; and
- (ii) where the sole plaintiff or none of the plaintiffs has sufficient immovable property within India other than the suit property.

9 *Puran Chand v Mangal Nanak*, AIR 1969 P&H 367

10 R 3, see also *State Bank of Bikaner & Jaipur v Abdul Wahid*, AIR 2003 Raj 61

11 *Dinesh Textiles v. State Bank of Bikaner & Jaipur*, AIR 1999 Raj 162

12 R 4(2), see also *Dinesh Textiles v. State Bank of Bikaner & Jaipur*, AIR 1999 Raj 162 (1999) 3 Civ LJ 336

13 R 4(1), see also *State Bank of Bikaner & Jaipur v Abdul Wahid*, AIR 2003 Raj 61

14 *Premchand, Re*, ILR (1894) 21 Cal 832, *Arumugam Chettiar v K R S Sevugan Chettiar*, AIR 1950 Mad 779 (1950) 2 M LJ 159, *Narasinga Shenoi v Madhava Prabhu*, AIR 1960 Ker 45

15 Or 25 R 1

Rule 10 of Order 41 provides for taking of security for costs of appeal.<sup>16</sup>

## (2) Object

The object of the rule is to provide for the protection of the defendants in certain cases where, in the event of success, they may have difficulty in realizing their costs from the plaintiff.<sup>17</sup> It is a discretionary power which can be exercised only in exceptional circumstances, where it is shown that the exercise of power is necessary for the reasonable protection of the interests of the defendant.<sup>18</sup> An order for security of costs may be passed by the court either *suo motu* (of its own motion) or on application of the defendant and must be a reasoned one. The provisions of this order apply even to a minor plaintiff.<sup>19</sup>

## (3) Failure to furnish security: Rule 2

If the security is not furnished within the time fixed or extended, the court shall dismiss the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom.<sup>20</sup> Sub-rule (2) of Rule 1 empowers the court to restore the suit dismissed under sub-rule (1). The dismissal shall not, however, be set aside without giving notice to the defendant.<sup>21</sup>

# 4. COMMISSIONS: ORDER 26

## (1) Issue of commissions: Section 75

Sections 75 to 78 deal with the powers of the court to issue commissions and detailed provisions have been made in Order 26 of the Code.<sup>22</sup> The power of the court to issue commission is discretionary and can be exercised by the court for doing full and complete justice between the parties.<sup>23</sup> It can be exercised by the court either on an application by a party to the suit or of its own motion (*suo motu*).<sup>24</sup>

16. See *infra*, "First Appeals", Pt. III, Chap. 2.

17. *Vinod Seth v. Devinder Bajaj*, (2010) 8 SCC 1; *Premchand, Re*, ILR (1894) 21 Cal 832 at p. 836.

18. *Arumugam Chettiar v. K R. S. Sevugan Chettiar*, AIR 1950 Mad 779; (1950) 2 M LJ 159.

19. *Bai Porebai v. Devji Meghji*, ILR (1898) 23 Bom 100; *Mohd. Kasim v. Haji Rahiman*.

20. Or. 25 R. 2(1).                      21. R. 2(3).

22. For detailed discussion, see, *Authors' Code of Civil Procedure* (Lawyer's Edn.) Vol. I at pp. 1062-73.

23. *Padam Sen v. State of U.P.*, AIR 1961 SC 218; (1961) 1 SCR 884; *Filmistan (P) Ltd v. Bhagwandas Santprakash*, (1970) 3 SCC 258; AIR 1971 SC 61.

24. *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161; AIR 1984 SC 802.

## (2) Purposes: Section 75

Section 75 enacts that a court may issue a commission for any of the following purposes:

- (i) to examine witnesses;
- (ii) to make local investigation;
- (iii) to adjust accounts;
- (iv) to make partition;
- (v) to hold investigation;
- (vi) to conduct sale; or
- (vii) to perform ministerial act.

### (a) To examine witnesses: Sections 76-78; Order 26 Rules 1-8

As a general rule, the evidence of a witness in an action, whether he is a party to the suit or not, should be taken in open court and tested by cross-examination. Inability to attend the court on grounds of sickness or infirmity or detriment to the public interest may justify issue of a commission. The court has a discretion to relax the rule of attendance in court where the person sought to be examined as a witness resides beyond the local limits of the jurisdiction of the court<sup>25</sup> or on any other ground which the court thinks sufficient<sup>26</sup>, e.g., a witness, who being a *paramhansa*, always remained in naked condition, can be examined on commission.<sup>27</sup> Similarly, if a party or a witness apprehends danger to his life if he appears before the court, he can be examined on commission.<sup>28</sup>

On the other hand, where a party accused of fraud seeks to examine himself on commission, the court may refuse the prayer since the opportunity of noting his demeanour would be lost.<sup>29</sup> The power, also, should not be exercised on the ground that the witness is a man of rank or having social status and it will be derogatory for him to appear in person in court.<sup>30</sup>

The court may issue a commission for the examination on interrogatories or otherwise of any person in the following circumstances:

- 25. *Ramakrishna Kulwant Rai v F E Hardcastle & Co (P) Ltd*, AIR 1963 Mad 103 at p. 104. *Filmistan (P) Ltd v Bhagwandas Santprakash*, (1970) 3 SCC 258. AIR 1971 SC 61. See also *infra*, Chap. 14.
- 26. *Bandhua Mukti Morcha v Union of India*, (1984) 3 SCC 161 (paras 14, 69, 80). AIR 1984 SC 802 (paras 14, 70, 81).
- 27. *Paramhansa Ramkrishna v Trimbak Rajaram*, AIR 1978 Bom 176.
- 28. *Vinayak Trading Co v Sham Sunder & Co*, AIR 1987 AP 236.
- 29. *Satish Chandra v Kumar Satish Kantha*, AIR 1923 PC 73. 171 IC 391 (1924) 39 Cal LJ 165 (PC).
- 30. *A Marcelline Fernando v St Francis Xavier Church*, AIR 1961 Mad 31, *Panachand Chhotalal v Manoharlal Nandlal*, AIR 1917 Bom 155.

- (i) if the person to be examined as a witness resides within the local limits of the court's jurisdiction, and (i) is exempted under the Code from attending court; or (ii) is from sickness or infirmity unable to attend court, or (iii) in the interest of justice, or for expeditious disposal of the case, or for any other reason, his examination on commission will be proper;<sup>31</sup> or
- (ii) if he resides beyond the local limits of the jurisdiction of the court;<sup>32</sup> or
- (iii) if he is about to leave the jurisdiction of the court;<sup>33</sup> or
- (iv) if he is a government servant and cannot, in the opinion of the court, attend without detriment to the public service;<sup>34</sup> or
- (v) if he is residing out of India and the court is satisfied that his evidence is necessary.<sup>35</sup>

The court may issue such a commission either *suo motu* (of its own motion) or on the application of any party to the suit or of the witness to be examined.<sup>36</sup> The evidence taken on commission shall form part of the record.<sup>37</sup> It shall, however, not be read in evidence in the suit without the consent of the party against whom it is offered, unless (a) the person, who gave the evidence, is beyond the jurisdiction of the court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in court, or is a person in the service of the government who cannot, in the opinion of the court, attend without detriment to the public service, or (b) the court in its discretion dispenses with the proof of any of such circumstances.<sup>38</sup>

**(b) To make local investigation: Rules 9 and 10**

The court may, in any suit, issue a commission to such person as it thinks fit directing him to make local investigation and to report thereon for the purpose of (a) elucidating or clarifying any matter in dispute, or (b) ascertaining the market value of any property or the amount of any mesne profits or damages or annual net profits.<sup>39</sup>

The object of local investigation is not to collect evidence which can be taken in court but to obtain evidence which from its very peculiar nature can be had only on the spot.<sup>40</sup> Such evidence enables the court to properly and correctly understand and assess the evidence on record and clarify any point which is left doubtful.<sup>41</sup> It also helps the court in

31. Or. 26 Rr. 1, 3, 4-A; Ss. 76, 77, 78.

33. *Ibid.*

36. Rr. 2, 6.

39. R 9.

40. *Padam Sen v. State of U.P.*, AIR 1961 SC 218 (1961) 1 SCR 884; *P. Moosa Kutty, Re*, AIR 1953 Mad 717 at p 718; *Debendranath v. Natha Bhuyian*, AIR 1973 Ori 240 at p. 241.

41. *Ibid.*

32. R 4.

35. Rr 5, 10, 12, 14.

38. R 8.

34. *Ibid.*

37. R. 7.

deciding the question in controversy pending before it, e.g., whether the suit premises is really occupied by the tenant or by strangers.<sup>42</sup>

**(c) To adjust accounts: Rules 11 and 12**

In any suit in which an examination or adjustment of accounts is necessary, the court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.<sup>43</sup> The court, for this purpose, shall issue necessary instructions to the Commissioner. The proceedings and the report (if any) of the Commissioner shall be evidence in the suit.<sup>44</sup>

**(d) To make partition: Rules 13 and 14**

Where a preliminary decree for partition of immovable property has been passed, the court may issue a commission to such person as it thinks fit to make a partition or separation according to the rights declared in such decree.<sup>45</sup> The Commissioner shall, after such inquiry as may be necessary, divide the property into the required number of shares and allot them to the parties. He will then prepare a report appointing the share of each party and distinguishing the same by metes and bounds and transmit it to the court. The court shall, after hearing the objections of different parties, make the final allotment.<sup>46</sup>

**(e) To hold investigation: Rule 10-A**

Where any question arising in a suit involves any scientific investigation which cannot, in the opinion of the court, be conveniently conducted before the court, the court may, if it thinks it necessary or expedient in the interest of justice so to do, issue a commission to such person as it thinks fit, directing him to inquire into such question and report thereon to the court.<sup>47</sup>

**(f) To sell property: Rule 10-C**

Where, in any suit, it becomes necessary to sell any movable property which is in the custody of the court pending the determination of the suit and which cannot be conveniently preserved, the court may, if, for reasons to be recorded, is of opinion that it is necessary or expedient in the interest of justice so to do, issue a commission to such person as it

42 *Southern Command Military Engg. Services Employees Coop. Credit Society v. V. K. K. Namthar*, (1988) 2 SCC 292 AIR 1988 SC 2126

43 R 11

44 R 12

45 R 13

46 R 14; see also *Tushar Kanti v. Savitri Devi*, (1996) 10 SCC 96 AIR 1996 SC 2752

47 R 10-A

thinks fit, directing him to conduct such sale and report thereon to the court.<sup>48</sup>

(g) To perform ministerial act: Rule 10-B

Where any question arising in a suit involves the performance of any ministerial act which cannot, in the opinion of the court, be conveniently performed before the court, the court may, if, for reasons to be recorded, is of opinion that it is necessary or expedient in the interest of justice so to do, issue a commission to such person as it thinks fit, directing him to perform that ministerial act and report thereon to the court.<sup>49</sup>

By the Amendment Act of 1976, Rules 10-A to 10-C have been inserted to provide for issue of commissions for scientific investigation, sale of movable property or performance of a ministerial act. Ministerial work means not the office work of the court but work like accounting, calculation and other work of a like nature which courts are not likely to take up without unnecessary waste of time. The Commissioner appointed by the court does not perform any judicial function.<sup>50</sup>

The provisions to issue commissions under the Code of Civil Procedure are exhaustive and, hence, the court cannot exercise inherent powers under Section 151 for the purpose.<sup>51</sup> The Supreme Court or High Courts under the Constitution can exercise plenary powers to issue a commission for any purpose.<sup>52</sup>

### (3) Powers: Rules 16-18

The Commissioner may (i) summon and procure the attendance of parties and their witnesses and examine them;<sup>53</sup> (ii) call for and examine documents;<sup>54</sup> (iii) enter into any land or building mentioned in the order;<sup>55</sup> (iv) proceed *ex parte* if the parties do not appear before him in spite of the order of the court.<sup>56</sup> Rule 18-B empowers the court to fix the date for return of a commission.

48. R. 10-C.

49. R. 10-B; *Jagatbhai Punjabhai Palkhiwala v. Vikrambhai Punjabhai Palkhiwala*, AIR 1985 Guj 34.

50. *Jagatbhai v. Vikrambhai*, AIR 1985 Guj 34; *Tushar Kanti v. Savitri Devi*, (1996) 10 SCC 96; AIR 1996 SC 2752.

51. *Padam Sen v. State of U P.*, AIR 1961 SC 218; (1961) 1 SCR 884, *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161; AIR 1984 SC 802; *Jaiswal Coal Co. v. Fatehganj Coop. Mktg. Society Ltd.*, AIR 1975 Cal 303. For inherent powers of courts, see *infra*, Pt V, Chap. 4.

52. *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161; AIR 1984 SC 802.

53. Rr 16, 17

54. R 16.

55. *Ibid.*

56. R. 18.

#### (4) Expenses: Rule 15

Rule 15 provides that the court may, if it thinks fit, order the party requiring the commission to deposit the necessary expenses within the fixed period.

#### (5) Commissions for foreign tribunals: Rules 19-22

Rules 19 to 22 provide that if a High Court is satisfied that a foreign court wishes to obtain the evidence of a witness residing within its appellate jurisdiction in a proceeding of a civil nature, it may issue a commission for the examination of such witness.

#### (6) Limitations

A judicial function of a court cannot be delegated to a commission.<sup>57</sup> Thus, no commission can be issued to value the property in dispute as it is the function of the court. But commission can be appointed to gather data to help such determination by court.<sup>58</sup> Similarly, commission cannot be appointed to scrutinise votes at the election, but it can be entrusted work of separating undisputed votes from disputed votes or of counting votes as it is merely a ministerial work.<sup>59</sup>

Again, it is not the business of the court to collect evidence for a party nor to protect the rival party from the evil consequences. A civil court, hence, cannot appoint a commission to seize account books in possession of any party on the ground that an opposite party has an apprehension that they would be tempered with.<sup>60</sup>

#### (7) Report of Commissioner: Evidentiary value

The report of the Commissioner would furnish *prima facie* evidence of the facts and data collected by the Commissioner. It will constitute an important piece of evidence and cannot be rejected except on sufficient grounds.<sup>61</sup> It would, however, be open to the court to consider what weight to be attached to the data collected by the Commissioner and reflected in the report and to what extent act upon them.<sup>62</sup>

57 *Ram Krishna Muraji v. Ratan Chand*, (1930-31) 58 IA 173; AIR 1931 PC 136

58. *Narayana Menoki v. Raman Nair*, 1967 KLT 200, *VV Dravid v. State*, AIR 1982 MP 159, *Kershaji Dhanjibhai v. Kaikhushru Kolhabhai*, AIR 1929 Bom 478 (1929) 31 Bom LR 1081.

59 *Ibid.* see also *Habibbhai v. Maganbhai*, (1995) 1 Guj LR 871 (1995) 2 Guj CD 16

60 *Padam Sen v. State of U P*, AIR 1961 SC 218 (1961) 1 SCR 884

61 *Tushar Kanti v. Savitri Devi*, (1996) 10 SCC 96 AIR 1996 SC 2752, *Raundel & Co. v. Union of India*, (2000) 6 SCC 506, *Praga Tools Corpn. Ltd. v. Mahabubunnissa Begum*, (2001) 6 SCC 238

62 *Ibid. Roy & Co. v. Nani Bala*, AIR 1979 Cal 50

### (8) Issuance of commission by Supreme Court and High Courts

The limitations for the issue of commission set out in Section 79 and Order 26 of the Code do not apply to issuance of commission by the Supreme Court or by High Courts in exercise of powers under the Constitution of India.<sup>63</sup>

## 5. ARREST BEFORE JUDGMENT: ORDER 38 RULES 1-4

### (1) Nature and scope

Generally, a creditor having a claim against his debtor has first to obtain a decree against him and then execute the said decree by having him arrested or his property attached in execution under the provisions of Order 21.<sup>64</sup> Under special circumstances, however, the creditor can move for the arrest of the debtor or for the attachment of his property even before the judgment.

### (2) Object

The object underlying these provisions is to enable the plaintiff to realise the amount of decree if one is eventually passed in his favour and to prevent any attempt on the part of the defendant to defeat the execution of such decree passed against him.<sup>65</sup>

### (3) Grounds: Rule 1

Where at any stage of the suit, the court is satisfied, either by affidavit or otherwise, (a) that the defendant, with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him, (i) has absconded or left the local limits of the jurisdiction of the court, or (ii) is about to abscond or leave the local limits of the jurisdiction of the court, or (iii) has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof, or (b) that the defendant is about to leave India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in

63. For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. I at pp. 1068-70

64. For detailed discussion, see *infra*, Pt. IV.

65. *Raman Tech. & Process Engg. Co v. Solanki Traders*, (2008) 2 SCC 302.

the suit, the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance.<sup>66</sup> The defendant shall not, however, be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim.<sup>67</sup>

#### (4) Discretion of court

The power to arrest the defendant and that too before a decree in favour of the plaintiff is a drastic action and must be taken after due care, caution and circumspection. Before a court acts under this rule, it must have reason to believe on adequate material that unless the power is exercised, there is a real danger that the defendant will remove himself or his property from the jurisdiction of the court.<sup>68</sup>

The power of arrest before judgment can neither be used as lever for the plaintiff to coerce or compel the defendant to come to terms, nor to secure easy execution of decree.<sup>69</sup>

#### (5) Conditions

An application for arrest may be made by the plaintiff at any time after the plaint is presented, even before the service of summons is effected on the defendant. However, before this extraordinary power can be exercised, the court must be satisfied about the following two conditions:<sup>70</sup>

- (a) The plaintiff's suit must be *bona fide* and his cause of action must be *prima facie* unimpeachable subject to his proving the allegations in the plaint; and
- (b) the court must have reason to believe on adequate materials that unless this extraordinary power is exercised there is a real danger that the defendant will remove himself or his property from the ambit of the powers of the court.

66 Or. 38 R 1.                      67 Proviso to R 1

68. *Vareed Jacob v Sosamma Greevarghese*, (2004) 6 SCC 378 AIR 2004 SC 3992, *Raman Tech & Process Engg. Co v Solanki Traders*, (2008) 2 SCC 302, *Sardar Govindrao Mahadik v. Devi Sahai*, (1982) 1 SCC 237 AIR 1982 SC 989.

69. *Raman Tech & Process Engg Co v Solanki Traders*, (2008) 2 SCC 302, *Goutiers v Roberts*, (1870) 13 Suth WR 278, *Vareed Jacob v. Sosamma Greevarghese*, (2004) 6 SCC 378 AIR 2004 SC 3992.

70. *Ibid* see also, *Seth Chand Mull v. Purushottamdoss* AIR 1926 Mad 584 ILR (1927) 50 Mad 27 94 IC 512, *Probode Chunder v M. Dowe*, ILR (1887) 14 Cal 695, *Vareed Jacob v Sosamma Greevarghese*, (2004) 6 SCC 378 AIR 2004 SC 3992, *V. Balakrishnan v J M Gowrieshan*, AIR 2001 Mad 20

## (6) Security: Rules 2-4

Where the defendant fails to show cause why he should not furnish security for his appearance, the court shall order him either to deposit in court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon.<sup>71</sup> The court has discretion as to the manner as also the amount of security.<sup>72</sup>

Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.<sup>73</sup>

Rule 3 lays down procedure to be adopted on an application by the surety for discharge of liability.

Where the defendant fails to furnish security or to find fresh security, the court may commit him to civil prison until the decision of the suit, or, where a decree is passed against him, until the decree has been executed.<sup>74</sup>

## (7) Where arrest before judgment not allowed?

An order for arrest of a defendant before judgment cannot be obtained in any suit for land or immovable property specified in clauses (a) to (d) of Section 16 of the Code.<sup>75</sup> Arrest before judgment also cannot be allowed to convert unsecured debt into a secured debt or to ensure easy execution of decree.<sup>76</sup>

## (8) Appeal

An order passed under Rule 2, 3 or 6 of Order 38 is appealable.<sup>77</sup>

## (9) Revision

An order of arrest made under Rule 1 of Order 38 can be said to be a "case decided" under Section 115 of the Code and is revisable.<sup>78</sup>

71. R 2(1).

72. *Stephen Commerce (P) Ltd. v. Vessel M.T. Zaima Navard*, AIR 1999 Cal 64.

73. R. 2(2).

74. R. 4.

75. R 1.

76. *Raman Tech. & Process Engg. Co. v. Solanki Traders*, (2008) 2 SCC 302; *Goutiers v. Roberts*, (1870) 13 Suth WR 278.

77. Or. 43 R. 1(q).

78. *S. Selvarathinam v. Rajasekharam Nair*, AIR 2001 Ker 1; (2000) 1 KLJ 966; (2000) 2 KLT 372.

## (10) Arrest on insufficient grounds: Section 95

Where in any suit in which an order of arrest of the defendant has been obtained on insufficient grounds by the plaintiff, or where the suit of the plaintiff fails and it appears to the court that there was no reasonable or probable ground for instituting it, on application being made by the defendant, the court may order the plaintiff to pay as compensation such amount, not exceeding fifty thousand rupees, as seems reasonable to the defendant for the expense or injury including injury to reputation caused to him.<sup>79</sup>

## 6. ATTACHMENT BEFORE JUDGMENT: ORDER 38 RULES 5-13

### (1) Nature and scope

Like arrest before judgment, in certain circumstances, an attachment before judgment may be ordered by the court. Rules 5-13 of Order 38 deal with attachment before judgment.

### (2) Object

The primary object of attachment before judgment is to prevent any attempt on the part of the defendant to defeat the realisation of the decree that may be passed against him.<sup>80</sup> It thus prevents any attempt on the part of the defendant to defeat realisation of the decree passed in favour of the plaintiff.<sup>81</sup>

In *Sardar Govindrao v. Devi Sahai*<sup>82</sup>, the Supreme Court observed:

"Attachment before judgment is levied where the court on an application of the plaintiff is satisfied that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, (a) is about to dispose of the whole or any part of his property, or (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court. The sole object behind the order levying attachment before judgment is to give an assurance to the plaintiff that his decree if made would be satisfied. It is a sort of a guarantee against the decree becoming infructuous for want of property available from which the plaintiff can satisfy the decree"<sup>83</sup>

(emphasis supplied)

79 S 95

80. *Padam Sen v. State of U P*, AIR 1961 SC 218 at p 220 (1961) 1 SCR 884. See also S 94(b), *Raman Tech. & Process Engg. Co. v. Solanki Traders*, (2008) 2 SCC 302.

81 *Ibid.*, see also *Sardar Govindrao Mahadik v. Devi Sahai*, (1982) 1 SCC 237 AIR 1982 SC 989.

82 *Sardar Govindrao Mahadik v. Devi Sahai*, (1982) 1 SCC 237 AIR 1982 SC 989.

83 *Ibid.* at p 268 (SCC) at p 1006 (AIR), *Raman Tech. & Process Engg. Co. v. Solanki Traders* (2008) 2 SCC 302.

### (3) Grounds: Rule 5

Where, at any stage of a suit, the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, (a) is about to dispose of the whole or any part of his property, or (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court; the court may direct the defendant, within a time to be fixed by it, either to furnish security, of such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.<sup>84</sup>

Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the court, the court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.<sup>85</sup>

The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.<sup>86</sup> The court may also in the order direct conditional attachment of the whole or any portion of the property. If an order of attachment is made without complying with the provisions of Rule 5(1), such attachment shall be void.<sup>87</sup> The provisions of Order 21 (execution proceedings) will also apply to attachment before judgment.<sup>88</sup>

### (4) Principles

The remedy of attachment before judgment is an extraordinary remedy and must be exercised sparingly and strictly in accordance with law and with utmost care and caution so that it may not become an engine of oppression.<sup>89</sup> Before an order of attachment can be made, the court must be satisfied about the following two conditions:

- (i) that the defendant is about to dispose of the whole or any part of his property; and

84. R. 5(1). See also *N. Pappammal v. L. Chidambaram*, AIR 1984 Mad 70.

85. R. 6(1) 86. R. 5(2).

87. R. 5(4). See also *N. Pappammal v. L. Chidambaram*, AIR 1984 Mad 70; *Y Vijayalakshamma v. Sakinala Lakshmaiah and Sons*, AIR 1980 AP 176 at p. 179; *G Subramania Mudaliar v. Murugesan*, AIR 1982 Mad 49 at pp 50-51; *T Srinivasan v. V Srinivasan*, AIR 1985 Mad 269.

88. R. 11-A

89. *Ratan Kumar v. Howrah Motor Co. (P) Ltd*, AIR 1975 Cal 180 at p. 181, *Premraj Mundra v. Mohd. Maneck Gazi*, AIR 1951 Cal 156, *Raman Tech & Process Engg. Co. v. Solanki Traders*, (2008) 2 SCC 302.

- (ii) that the disposal is with the intention of obstructing or delaying the execution of any decree that may be passed against him.<sup>90</sup>

An attachment practically takes away the power of alienation and such a restriction on the exercise of the undoubted rights of ownership ought not to be imposed upon an individual except upon clear and convincing proof that the order is needed for the protection of the plaintiff.<sup>91</sup> A man is not debarred from dealing with his property just because a suit has been filed against him. Otherwise in every case in which a suit is brought against a man if during the pendency of the proceedings he sells some of his properties that would be at once a sufficient ground to satisfy the court that he is disposing his property with intent to defraud the plaintiff. Clearly, there must be additional circumstances before the court can be satisfied that such an intention exists.<sup>92</sup> This process is never meant as a weapon for the plaintiff to coerce the defendant to come to terms. Hence, utmost caution and circumspection should guide the court. The court must advert to the provisions of the Code in this regard, advert to and investigate the allegations thrown against the defendant, satisfy itself that a case for attachment before judgment has been made out and then pass the requisite order. These principles have come to be recognised as mandates to the court and if the court acts in breach thereof, such an order of the court will have to be ignored as the result of dereliction of duty.<sup>93</sup>

Recently, in *Raman Tech. & Process Engg. Co. v. Solanki Traders*<sup>94</sup>, the Supreme Court stated:

"The power under Order 38 Rule 5 CPC is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilise the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out-of-court settlements under threat of attachment."<sup>95</sup>

The following powerful observations of Dawson Miller, C.J.<sup>96</sup> are worth quoting:

90. *Ibid.* see also *Hari Sankar v. Bhoori Devi*, (1975) 77 PLR 133, *Bharat Tobacco Co. v. Maula Saheb*, AIR 1980 Guj 202 (1981) 22 Guj LR 343.

91. *Jai Prakash v. Basanta Kumari*, (1911) 15 IC 604 (Cal).

92. *Nowroji Pudumjee v. Deccan Bank Ltd.* AIR 1921 Bom 69.

93. *T. Srinivasan v. V. Srinivasan*, AIR 1985 Mad 269, see also *Bharat Tobacco Co. v. Maula Saheb*, AIR 1980 Guj 202 (1981) 22 Guj LR 343.

94. (2008) 2 SCC 302.

95. *Ibid.* at p. 304.

96. *Chandrika Prasad Singh v. Hira Lal*, AIR 1924 Pat 312 73 IC 721.

"The power given to the court to attach a defendant's property before judgment is never meant to be exercised lightly or without clear proof of the existence of the mischief aimed at in the rule. To attach a defendant's property before a defendant's liability is established by a decree, may have the effect of seriously embarrassing him in the conduct of the defence, as the properties could not be alienated even for the purpose of putting him in funds for defending the suit, which may eventually prove to have been entirely devoid of merit. *Such a power is only given when the court is satisfied not only that the defendant is about to dispose of his properties or to remove it from the jurisdiction of the court, but also that his object in so doing is to obstruct or delay the execution of any decree that may be passed against him, and so deprive the plaintiff, successful, of the fruits of victory.*"<sup>97</sup> (emphasis supplied)

Suffice to say that in the leading case of *Premraj Mundra v. Mohd. Maneck Gazi*<sup>98</sup>, after referring to several authorities, Justice Sinha had deduced the following principles relating to passing of an order of attachment before judgment:

- (1) That an order under Order 38, Rules 5 and 6 can only be issued if circumstances exist as are stated therein.
- (2) Whether such circumstances exist is a question of fact which must be proved to the satisfaction of the court.
- (3) That the court would not be justified in issuing an order for attachment before judgment, or for security, merely because it thinks that no harm would be done thereby or that the defendants would not be prejudiced.
- (4) That the affidavits in support of the contentions of the applicant must not be vague, and must be properly verified. Where it is affirmed as true to knowledge or information or belief, it must be stated as to which portion is true to knowledge, the source of information should be disclosed, and the grounds for belief should be stated.
- (5) That a mere allegation that the defendant was selling off his properties is not sufficient. Particulars must be stated.
- (6) There is no rule that transactions before a suit cannot be taken into consideration, but the object of attachment before judgment must be to prevent future transfer or alienation.
- (7) Where only a small portion of the property belonging to the defendant is being disposed of, no inference can be drawn in the absence of other circumstances that the alienation is necessarily to defraud or delay the plaintiff's claim.
- (8) That the mere fact of transfer is not enough, since nobody can be prevented from dealing with his properties simply because a suit has been filed. There must be additional circumstances to

97. *Ibid*, at p. 314 (AIR).

98. AIR 1951 Cal 156: 87 Cal LJ 41.

show that the transfer is with an intention to delay or defeat the plaintiff's claim. It is open to the court to look to the conduct of the parties immediately before the suit and to examine the surrounding circumstances and to draw an inference as to whether the defendant is about to dispose of the property, and if so, with what intention. The court is entitled to consider the nature of the claim and the defence put forward.

- (9) The fact that the defendant is in insolvent circumstances or in acute financial embarrassment is a relevant circumstance, but not by itself sufficient.
- (10) That in the case of running businesses, the strictest caution is necessary and the mere fact that a business has been closed, or that its turnover has diminished, is not enough.
- (11) Where, however, the defendant starts disposing of his properties one by one, immediately upon getting notice of the plaintiff's claim, and/or where he had transferred the major portion of his properties shortly prior to the institution of the suit, and was in an embarrassed financial condition, these were grounds from which an inference could legitimately be drawn that the object of the defendant was to delay and defeat the plaintiff's claim.
- (12) Mere removal of properties outside the jurisdiction of the court concerned is not enough, but where the defendant, with notice of the plaintiff's claim, suddenly begins removal of his properties outside the jurisdiction of the appropriate court, and without any satisfactory reason, an adverse inference may be drawn against the defendant. Where the removal is to a foreign country, the inference is greatly strengthened.
- (13) The defendant in a suit is under no liability to take any special care in administering his affairs, simply because there is a claim pending against him. Mere neglect or suffering execution by other creditors is not a sufficient reason for an order under Order 38 of the Code.
- (14) The sale of properties at a gross undervalue, or *benami* transfers, are always good indications of an intention to defeat the plaintiff's claim. The court must, however, be very cautious about the evidence on these points and not rely on vague allegations.<sup>99</sup>

### (5) Conditional attachment

The court has ample power to direct conditional attachment<sup>100</sup> No prior notice is necessary in such cases. It is, however, open to the defendant

99. *Premraj Mundra v Mohd. Maneck Gazi*, AIR 1951 Cal 156 at p. 160-61, 87 Cal LJ 41, see also *Raman Tech. & Process Engg. Co. v Solanki Traders* (2008) 2 SCC 302.

100. R. 5(3).

and his right to show cause against attachment has not been affected.<sup>101</sup> Final order of attachment should be passed only after affording an opportunity of hearing to the defendant.<sup>102</sup>

Conditional order of attachment, however is not by itself attachment. Unless the property is actually attached in accordance with the procedure prescribed by the Code, the order is ineffective and no attachment can be made of property.<sup>103</sup>

#### (6) Mode of attachment: Rule 7

Rule 7 enacts that attachment shall be made in the manner provided for attachment of property in execution of a decree.

#### (7) Exemption from attachment: Rule 12

The court cannot order attachment or production of any agricultural produce in possession of an agriculturist.<sup>104</sup>

#### (8) Rights of third party: Rule 10

An attachment before judgment does not affect the rights of persons, existing prior to the attachment, if they are not parties to the suit.<sup>105</sup>

#### (9) Adjudication of claims: Rule 8

Rule 8 provides that any claim preferred to the property, attached before judgment, shall be adjudicated upon in the manner provided for adjudication of claims to property attached in execution of a decree for the payment of money.

#### (10) Reattachment in execution: Rules 11-11-A

Where the property is under attachment, and a decree is subsequently passed in favour of the plaintiff, it is not necessary to apply for fresh attachment of the property in execution.<sup>106</sup> The provisions of Order 21

101. *Sardar Govindrao Mahadik v. Devi Sahai*, (1982) 1 SCC 237; AIR 1982 SC 989; *Shalimar Rope Works Ltd. v. N C. John and Sons Ltd.*, (1986) Ker LT 1366; *Sohanraj Ganeshmal Shah v. Gulabrao B. Kate*, AIR 1972 Bom 377; (1972) 74 Bom LR 107.

102. R. 6.

103. *Mahadev Vasudev v. Janaksingh*, AIR 1954 Bom 251; *Vasavamba (Smt.) v. Parasuram Sait and Sons*, AIR 1973 Mys 291; *Sri Krishna Gupta v. Shri Ram Babu*, AIR 1967 All 136.

104. R. 12.

105. R. 10, see also *Vannarakkal Kallalathil v. Chandra Maath Balkrishnan*, (1990) 3 SCC 291; *Hamda Ammal v. Avadiappa Pathar*, (1191) 1 SCC 715.

106. R. 11.

applicable to an attachment made in execution of a decree will also apply to an attachment before judgment.<sup>107</sup>

### (11) Effect of attachment

An order of attachment before judgment is a sort of guarantee against decree becoming infructuous for want of property available for satisfaction of such decree. The plaintiff, however, does not get title by effecting attachment before judgment.<sup>108</sup>

### (12) Withdrawal of attachment

Where the defendant furnishes security, the court must withdraw the attachment.<sup>109</sup>

### (13) Removal of attachment: Rule 9

An order of attachment will be withdrawn if the defendant furnishes security or the suit is dismissed.<sup>110</sup>

### (14) Determination of attachment

An attachment under the Code will be determined in the following circumstances:

- (i) where the defendant furnishes security;
- (ii) where attaching creditor abandons/withdraws attachment;
- (iii) where the suit is dismissed;
- (iv) where the decree is satisfied;
- (v) where the decree is reversed/set aside;
- (vi) where the court releases the property;
- (vii) where after the attachment, application for execution is dismissed;
- (viii) where the decree-holders fails to do what he is required to do under the decree.

### (15) Appeal

An order passed under Order 38 Rule 6 is appealable.<sup>111</sup>

107. R 11-A

108. *Sardar Govindrao Mahadik v. Devi Sahai*, (1982) 1 SCC 237. AIR 1982 SC 989, *Firm Amin Chand Hakam Chand v. Noshah Begum*, AIR 1954 Punj 235

109. R 9

110. R 9

111. Or 43 R 1(q)

### (16) Revision

An order granting or refusing attachment before judgment is a case decided within the meaning of Section 115 of the Code and is revisable by the High Court.<sup>112</sup>

### (17) Wrongful attachment

A suit for damages is maintainable for wrongful attachment of property.<sup>113</sup>

### (18) Attachment on insufficient grounds: Section 95

Where in any suit in which an order of attachment of the property of a defendant has been obtained on insufficient grounds by the plaintiff, or where the suit of the plaintiff fails and it appears to the court that there was no reasonable or probable ground for instituting it, on application being made by the defendant, the court may order the plaintiff to pay as compensation such amount, not exceeding fifty thousand rupees, as it deems reasonable to the defendant for the expense or injury including injury to reputation caused to him.<sup>114</sup>

## 7. TEMPORARY INJUNCTIONS: ORDER 39 RULES 1-5

### (1) General

Every court is constituted for the purpose of administering justice among parties and, therefore, must be deemed to possess all such powers as may be necessary to do full and complete justice to the parties before it.

### (2) Meaning

An injunction is a judicial process whereby a party is required to do, or to refrain from doing, any particular act. It is a remedy in the form of an order of the court addressed to a particular person that either prohibits him from doing or continuing to do a particular act (prohibitory injunction); or orders him to carry out a certain act (mandatory injunction).<sup>115</sup>

112. *International Air Transport Assn. v. Hansa Travels (P) Ltd.*, AIR 1998 Ker 80.

113. For detailed discussion, see *infra*, "Attachment on insufficient grounds Section 95".

114. S. 95; See also *Ananda v. Shariatullah*, AIR 1932 Cal 92; 35 CWN 546, *Gyan Prakash v. Kishori Lal*, AIR 1942 All 261; ILR 1942 All 360; *Mudhun Mohun v. Gokul Dass*, (1866) 10 MIA 563; *Brahmasuria v. Amba Bai*, AIR 1964 Mys 41; *Bank of India v. Shital Chandra*, AIR 1986 Cal 313.

115. *Halsbury's Laws of England* (4th Edn.) Vol. 24, para 901. See also, *Authors' Lectures on Administrative Law* (2012) Lecture X; *Food Corporation of India v. Sukh Deo Prasad*,

### (3) Stay and injunction

There is difference between stay and injunction. "Stay" means stoppage, arrest or suspension of judicial proceeding, while "injunction" means restraining or preventing a person from commencing or continuing action. Order of stay is addressed to court while order of injunction is issued to party. Injunction becomes effective as soon as it is issued whereas stay operates only when it is communicated to the court to which it is issued.<sup>116</sup>

### (4) Doctrine explained

It is well-settled principle of law that interim order can always be granted in the aid of and as ancillary to the main relief available to the party on final determination of his rights in a suit or any other proceeding. Therefore, a court undoubtedly possesses the power to grant interim relief during the pendency of the suit.<sup>117</sup> Temporary injunctions are thus injunctions issued during the pendency of proceedings.

### (5) Object

The primary purpose of granting interim relief is the preservation of property in dispute till legal rights and conflicting claims of the parties before the court are adjudicated. In other words, the object of making an order regarding interim relief is to evolve a workable formula to the extent called for by the demands of the situation, keeping in mind the pros and cons of the matter and striking a delicate balance between two conflicting interests, i.e., injury and prejudice, likely to be caused to the plaintiff if the relief is refused; and injury and prejudice likely to be caused to the defendant if the relief is granted. The court in the exercise of sound judicial discretion can grant or refuse to grant interim relief.<sup>118</sup>

The underlying object of granting temporary injunction is to maintain and preserve *status quo* at the time of institution of the proceedings and to prevent any change in it until the final determination of the suit

(2009) 5 SCC 665 AIR 2009 SC 2330

116 *Mulraj v. Murti Raghunathji Maharaj*, AIR 1967 SC 1386 (1967) 3 SCR 84

117 *State of Orissa v. Madan Gopal*, AIR 1952 SC 12 at p. 14 1952 SCR 28; *Premier Automobiles v. Kamlekar Shantaram*, (1976) 1 SCC 496 AIR 1975 SC 2238; *Dorab Cowasji Warden v. Coomi Sorab Warden*, (1990) 2 SCC 117 AIR 1990 SC 867; *Shiv Kumar v. MCD* (1993) 3 SCC 161.

118 *Dorab Cowasji Warden v. Coomi Sorab Warden*, *supra*; *CCE v. Dunlop India Ltd.* (1985) 1 SCC 260 at pp. 266-67 AIR 1985 SC 330; *Shiv Kumar v. MCD* (1993) 3 SCC 161; *Hindustan Petroleum Corpn. Ltd. v. Sriman Narayan*, (2002) 5 SCC 760; *Transmission Corpn. of A.P. Ltd. v. Lanco Kondapalli Power (P) Ltd.* (2006) 1 SCC 540.

It is in the nature of protective relief granted in favour of a party to prevent future possible injury.<sup>119</sup>

The need for such protection, however, has to be judged against the corresponding need of the defendant to be protected against injury resulting from exercising his own legal rights. The court must weigh one need against another and determine where the balance of convenience lies and may pass an appropriate order in exercise of its discretionary power.<sup>120</sup>

## (6) Types

Injunctions are of various types; they are: (i) temporary; and (ii) permanent. Perpetual or permanent injunction restrains a party *forever* from doing the specified act and can be granted only on merits at the conclusion of the trial after hearing both the parties to the suit.<sup>121</sup> It is governed by Sections 38 to 42 of the Specific Relief Act, 1963. Temporary or interim injunction, on the other hand, restrains a party *temporarily* from doing the specified act and can be granted only until the disposal of the suit or until the further orders of the court. It is regulated by the provisions of Order 39 of the Code of Civil Procedure, 1908 and may be granted at any stage of the suit.<sup>122</sup>

Injunctions are (i) preventive, prohibitive or restrictive, i.e. when they prevent, prohibit or restrain someone from doing something; or (ii) mandatory, i.e. when they compel, command or order some person to do something. Again, an injunction may be (i) ad interim; or (ii) interim. Ad-interim injunction is granted without finally deciding an application for injunction and operates till the disposal of the application. Interim injunction is normally granted while finally deciding main application and operates till the disposal of the suit.

## (7) Who may apply?

It is not the plaintiff alone who can apply for an interim injunction. A defendant may also make an application for grant of an injunction against the plaintiff.<sup>123</sup>

119. *Ibid*, see also *Polins v. Gray*, (1879) 12 Ch D 438, *ITO v. M K Mohd Kunhi* AIR 1969 SC 430; (1969) 2 SCR 65, *Manohar Lal Chopra v. Seth Hiralal*, AIR 1962 SC 527. 1962 Supp (1) SCR 450.

120. *Gujarat Bottling Co. Ltd. v. Coca Cola Co.*, (1995) 5 SCC 545; AIR 1995 SC 2372 at p. 2389.

121. S. 37(2), Specific Relief Act, 1963.

122. S. 37(1), Specific Relief Act, 1963.

123. Or. 39 R. 1(a), see also *Rattu v. Mala*, AIR 1968 Raj 212; *B F. Varghese v Joseph Thomas*, AIR 1957 TC 286, *Municipal Corpn of Greater Bombay v Bhagwan Sakharan Salaskar*,

## (8) Against whom injunction may be issued

An injunction may be issued only against a party and not against a stranger or a third party.<sup>124</sup> It also cannot be issued against a court or judicial officer.<sup>125</sup> Normally, injunction can be granted against persons within the jurisdiction of the court concerned.<sup>126</sup>

## (9) Grounds: Rule 1

Temporary injunction may be granted by a court in the following cases:

- (a) where any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree;<sup>127</sup> or
- (b) where a defendant threatens, or intends to remove or dispose of his property with a view to defrauding his creditors;<sup>128</sup> or
- (c) where a defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit;<sup>129</sup> or
- (d) where a defendant is about to commit a breach of contract, or other injury of any kind;<sup>130</sup> or
- (e) where a court is of the opinion that the interest of justice so requires.<sup>131</sup>

## (10) Principles

The power to grant a temporary injunction is at the discretion of the court. This discretion, however, should be exercised reasonably, judiciously and on sound legal principles. Injunction should not be lightly granted as it adversely affects the other side. The grant of injunction is in the nature of equitable relief, and the court has undoubtedly power

AIR 1974 Bom 272; *Ganga Bricks Udhyog v. Jai Bhagwan Swarup*, AIR 1982 All 333. *Gujarat Bottling Co. Ltd. v. Coca Cola Co.*, (1995) 5 SCC 545; AIR 1995 SC 2372

124. *L D Meston School Society v. Kashi Nath*, AIR 1951 All 558, *Fakira v. Rumsukhibai*, AIR 1946 Nag 428; ILR 1946 Nag 908; *Marwari Sabha v. Kanhaya Lal*, AIR 1973 All 298

125. *Ibid.*, see also, *Kalia v. Gram Sabha Manas*, AIR 1973 P&H 479, *Mahanth Ramkeshwar v. Baldeo Singh*, AIR 1938 Pat 606, *Varanasaya Sanskrit Vishwavidyalaya v. Rajkishore*, (1977) 1 SCC 279; AIR 1977 SC 615, *Mulraj v. Murti Reghunathji Maharaj*, AIR 1967 SC 1386 (1967) 3 SCR 84

126. *P Venkatachalam v. Rajagopala Naidu*, AIR 1932 Mad 705, *T A Menon v. K P Parvathi Ammal*, AIR 1950 Mad 373, *Modi Entertainment Network v. W S G Cricket PTE Ltd.*, (2003) 4 SCC 341 (351) AIR 2003 SC 1177

127. Or 39 R 1(a)

128. R 1(b)

129. 1 (c)

130. R 2(i)

131. See 94(1) 151. See also *Manohar Lal Chopra v. Seth Hiralal*, AIR 1962 SC 527, 1962 Supp (1) SCR 450, *Cotton Corpn. of India v. United Industrial Bank* (1983) 4 SCC 625 AIR 1983 SC 12722

to impose such terms and conditions as it thinks fit.<sup>132</sup> Such conditions, however, must be reasonable so as not to make it impossible for the party to comply with the same and thereby virtually denying the relief which he would otherwise be ordinarily entitled to.

Generally, before granting the injunction, the court must be satisfied about the following factors:<sup>133</sup>

- (i) Whether the plaintiff has a *prima facie* case?
- (ii) Whether the plaintiff would suffer irreparable injury if his prayer for temporary injunction is not granted?
- (iii) Whether the balance of (in)convenience is in favour of the plaintiff?

The above three rules are described as "three pillars" on which foundation of every order of injunction rests. It is also known as "triple test" for grant of interim injunction.

All these three elements are of extreme importance. They, therefore, need to be discussed in detail (alongwith other factors).

#### (a) Prima facie case

The first rule is that the applicant must make out a *prima facie* case in support of the right claimed by him. The court must be satisfied that there is a *bona fide* dispute raised by the applicant, that there is an arguable case for trial which needs investigation and a decision on merits and on the facts before the court there is a probability of the applicant being entitled to the relief claimed by him. The existence of a *prima facie* right and infraction of such right is a condition precedent for grant of temporary injunction. The burden is on the plaintiff to satisfy the court by leading evidence or otherwise that he has a *prima facie* case in his favour.<sup>134</sup>

Explaining the ambit and scope of the connotation "*prima facie*" case, in *Martin Burn Ltd. v. R.N. Banerjee*<sup>135</sup>, the Supreme Court observed:

132. R. 2(2).

133. *Dalpat Kumar v. Prahlad Singh*, (1992) 1 SCC 719; AIR 1993 SC 276; *Dorab Cowasji Warden v. Coomi Sorab Warden*, (1990) 2 SCC 117. AIR 1990 SC 867; *Wander Ltd. v. Antox India (P) Ltd.*, 1990 Supp SCC 727 at pp. 731-32. AIR 1990 SC 867 at pp. 876-77, *United Commercial Bank v. Bank of India*, (1981) 2 SCC 766 at pp. 787-88: AIR 1981 SC 1426 at p. 1440, *Gangubai v. Sitaram*, (1983) 4 SCC 31 at p. 33. AIR 1983 SC 742 at p. 743; *Shiv Kumar v. MCD*, (1993) 3 SCC 161; *Hindustan Petroleum Corpn. Ltd. v. Sriman Narayan*, (2002) 5 SCC 760, *Transmission Corpn. of A.P. Ltd. v. Lanco Kondapalli Power (P) Ltd.*, (2006) 1 SCC 540; *Seema Arshad Zaheer v. Municipla Corpn., Mumbai*, (2006) 5 SCC 282, 294; *Kishoresinh v. Maruti Corpn.*, (2009) 11 SCC 229; *Best Sellers Retail v Aditya Birla*, (2012) 6 SCC 792.

134. *Dalpat Kumar v. Prahlad Singh*, (1992) 1 SCC 719; AIR 1993 SC 276.

135. AIR 1958 SC 79; 1958 SCR 514.

"A *prima facie* case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. While determining whether a *prima facie* case had been made out the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence. It may be that the tribunal considering this question may itself have arrived at a different conclusion. It has, however, not to substitute its own judgment for the judgment in question. It has only got to consider whether the view taken is a possible view on the evidence on the record."<sup>136</sup> (emphasis supplied)

But *prima facie* case, should not be confused with a case proved to the hilt. It is no part of the court's function at that stage to try to resolve a conflict of evidence nor to decide complicated questions of fact and of law which call for detailed arguments and mature considerations. These are matters to be dealt with at the trial.<sup>137</sup> (emphasis supplied) In other words, the court should not examine the merits of the case *closely* at that stage because it is not expected to decide the suit finally. In deciding a *prima facie* case, the court is to be guided by the plaintiff's case as revealed in the plaint, affidavits or other materials produced by him.

*Prima facie* case must precede an order of injunction. Only when *prima facie* case is established that the court will consider other factors. If applicant fails to prove *prima facie* case, he is not entitled to temporary injunction.<sup>138</sup>

### (b) Irreparable injury

The existence of the *prima facie* case alone does not entitle the applicant for a temporary injunction.<sup>139</sup> The applicant must further satisfy the court about the second condition by showing that he will suffer irreparable injury if the injunction as prayed is not granted, and that there is no other remedy open to him by which he can protect himself from the consequences of apprehended injury. In other words, the court must be satisfied that refusal to grant injunction would result in "irreparable

136. *Ibid*, at p 85 (AIR) See also *Buckingham & Carnatic Co Ltd v. Workmen*, AIR 1953 SC 47 1953 SCR 219, *American Cyanamid Co v. Ethicon Ltd.*, *infra*, *Hindustan Petroleum Corpn. Ltd. v. Sriman Narayan*, (2002) 5 SCC 760, *Transmission Corpn of A P Ltd v Lanco Kondapalli Power (P) Ltd*, (2006) 1 SCC 540

137 *American Cyanamid Co v Ethicon Ltd*, 1975 AC 396 (1975) 2 WLR 316 (1975) 1 All ER 504.

138 *Kasni Nath Samsthan v Shrimad Sudhindra Thirtha Swamy*, (2010) 1 SCC 689, 692 AIR 2012 SC 296

139 *CCE v Dunlop India Ltd*, (1985) 1 SCC 260 at pp 266-67 AIR 1985 SC 330, *Transmission Corpn of A P Ltd v Lanco Kondapalli Power (P) Ltd*, (2006) 1 SCC 540, *State of Karnataka v State of A P*, (2000) 9 SCC 572 (654 55) *Dalpat Kumar v Prahlad Singh*, (1992) 1 SCC 719 (721) AIR 1993 SC 276 (277), *Best Sellers Retail v Aditya Birla*, (2012) 6 SCC 792

injury" to the party seeking relief and he needs to be protected from the consequences of apprehended injury. Granting of injunction is an equitable relief and such a power can be exercised when judicial intervention is absolutely necessary to protect rights and interests of the applicant.

In the leading case of *American Cyanamid Co. v. Ethicon Ltd.*<sup>140</sup>, the House of Lords has rightly pronounced the principle thus:

"[T]he governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction."<sup>141</sup>

The expression *irreparable injury*, however, does not mean that there should be no possibility of repairing the injury. It only means that the injury must be a material one, i.e. which cannot be *adequately* compensated by damages. An injury will be regarded as irreparable where there exists no specific or fixed pecuniary standards for measuring damages.<sup>142</sup>

Where both sides are exposed to irreparable injury pending trial, the court has to strike a just balance.<sup>143</sup>

### (c) Balance of (in)convenience

The third condition for granting interim injunction is that the balance of convenience must be in favour of the applicant. In other words, the

140. (1975) 1 All ER 504; 1975 AC 396 (1975) 2 WLR 316.

141. *American Cyanamid Co. v. Ethicon Ltd.*, 1975 AC 396 (1975) 2 WLR 316 (1975) 1 All ER 504; see also *Attorney General v. Hallett*, 153 ER 1316.

142. *Manohar Lal Chopra v. Seth Hiralal*, AIR 1962 SC 527; 1962 Supp (1) SCR 450. *Cotton Corpn. of India v. United Industrial Bank*, (1983) 4 SCC 625; AIR 1983 SC 1272.

143. *Mahadeo Savlaram Shelke v. Pune Municipal Corpn.*, (1995) 3 SCC 33.

court must be satisfied that the comparative mischief, hardship or inconvenience which is likely to be caused to the applicant by refusing the injunction will be greater than that which is likely to be caused to the opposite party by granting it.

The court while exercising discretion in granting or refusing injunction should exercise sound judicial discretion and should attempt to weigh substantial mischief or injury likely to be caused to the parties, if the injunction is refused, and compare it with that which is likely to be caused to the opposite party if the injunction is granted. If on weighing conflicting probabilities, the court is of the opinion that the balance of convenience is in favour of the applicant, it would grant injunction, otherwise refuse to grant it.<sup>144</sup>

Again, to quote the remarkable observations of Lord Diplock in *American Cyanamid Co. v. Ethicon Ltd.*<sup>145</sup>:

"The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. *The court must weigh one need against another and determine where 'the balance of convenience' lies.*"<sup>146</sup> (emphasis supplied)

Though English and Indian Courts have used the phrase "balance of convenience", the authors are of the view that proper expression should be "balance of inconvenience". It is submitted that once the plaintiff establishes *prima facie* case, the court will consider the question of granting or refusing interim injunction. Inconvenience, in the circumstances, is bound to be caused to one of the parties to the suit. Hence, it is the duty of the court to consider inconvenience of the plaintiff as against inconvenience of the defendant. If the court thinks that by refusing interim injunction, more or greater inconvenience will be caused to the plaintiff, it will grant injunction. If, on the other hand, it finds that by granting interim injunction, greater inconvenience will be caused to the defendant, it will refuse the relief. It is by considering *comparative inconvenience* that the court will exercise the discretion.

In the opinion of the authors, the concept is similar to "greater hardship" under Rent Laws. Several Rent Acts allow eviction decree against a tenant if the tenanted property is required by the landlord for *bona*

144 *Dalpat Kumar v. Prahlad Singh* (1992) 1 SCC 719 AIR 1993 SC 276

145 1975 AC 396 (1975) 2 WLR 316, (1975) 1 All ER 504

146 *Ibid.* at p. 509 (AER) at p. 406 (AC) at pp. 321-22 (WLR)

*fide* use and occupation. Those Acts, however, require Rent Court to consider the question of "greater hardship". Once the landlord proves his *bona fide* requirement, the court will consider whether greater hardship will be caused to the landlord by refusing to pass decree or to the tenant by passing such decree. And on the basis of such consideration (greater hardship) and finding thereon, the court will make an appropriate order evicting or refusing to evict tenant. The same principle applies in granting or refusing to grant temporary or interim injunction.

Burden of proof that the inconvenience which the plaintiff will suffer by refusal of injunction is greater than that which the defendant will suffer if it is granted lies on the plaintiff.<sup>147</sup>

#### (d) Other factors

The above principles and guidelines are merely illustrative and neither exhaustive nor absolute rules. It should not be forgotten that grant of injunction is discretionary and equitable remedy and power to grant injunction must be exercised in accordance with sound judicial principles. It is an equitable relief and even if all the above conditions are satisfied there may be other circumstances leading to a refusal to grant such a relief.<sup>148</sup>

As Lord Diplock stated, "I would reiterate that, in addition to those to which I have referred, there may be many other special factors to be taken into consideration in particular circumstances of individual cases."<sup>149</sup>

Thus a relief of injunction may be refused on the ground of delay, laches or acquiescence,<sup>150</sup> or where the applicant has not come with clean hands,<sup>151</sup> or has suppressed material facts,<sup>152</sup> or where monetary compensation is adequate relief.<sup>153</sup>

### (11) Discretion of court

Power to grant injunction is extraordinary in nature and it can be exercised cautiously and with circumspection. A party is not entitled to this relief as a matter of right or course. Grant of injunction being equitable remedy, it is in the discretion of the court and such discretion must

147. *Halsbury's Laws of England* (4th Edn) Vol. 24, para 956.

148. *Gujarat Bottling Co. Ltd. v. Coca Cola Co.*, (1995) 5 SCC 545; AIR 1995 SC 2372

149. *American Cyanamid Co. v. Ethicon Ltd.*, 1975 AC 396; (1975) 2 WLR 316; (1975) 1 All ER 504.

150. *Bharat Starch & Chemicals Ltd v. (Ahmedabad) Ltd Mill Stores*, AIR 1949 Cal 357

151. First Proviso to R. 4, see also *Mahua v. Union of India*, AIR 1971 Cal 507; *Transmission Corpn. of A P. Ltd. v. Lanco Kondapalli Power (P) Ltd*, (2000) 1 SCC 540

152. *Ibid*, see also *Vellakutty v. Karthyayani*, AIR 1968 Ker 179.

153. *V.D. Tripathy v. V.S. Dwivedi*, AIR 1976 All 97.

be exercised in favour of the plaintiff only if the court is satisfied that, unless the defendant is restrained by an order of injunction, irreparable loss or damage will be caused to the plaintiff. The Court grants such relief *ex debito justitiae*, i.e., to meet the ends of justice.<sup>154</sup>

It is a matter of common knowledge that on many occasions even public interest suffers in view of such interim orders of injunction, because persons in whose favour such orders are passed are interested in perpetuating the contraventions made by them by delaying the final disposal of such applications. The court should be always willing to extend its hand to protect a citizen who is being wronged or is being deprived of property without any authority of law or without following procedures which are fundamental and vital in nature. But at the same time, judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches the court.<sup>155</sup>

In *Dalpat Kumar v. Prahlad Singh*<sup>156</sup>, the Supreme Court stated, "The court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused, and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the court considers that, pending the suit, the subject-matter should be maintained in *status quo*, an injunction would be issued. Thus the court has to exercise its sound judicial discretion in granting or refusing the relief of *ad interim* injunction pending the suit."<sup>157</sup> (emphasis supplied)

The same considerations apply to the defendant seeking vacation of interim relief. In *Gujarat Bottling Co. Ltd. v. Coca Cola Co.*<sup>158</sup> the defendant committed a breach of agreement by transferring shares of the plaintiff to a third party without obtaining consent or even without informing the plaintiff. The plaintiff, therefore, terminated the agreement and obtained interim injunction against the defendant restraining him from entering into an agreement with the third party. The defendant applied for vacating the interim injunction.

Rejecting the prayer, the Supreme Court observed:

"Under Order 39 of the Code of Civil Procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being approached, will, apart from

154 *Shiv Kumar v. MCD*, (1993) 3 SCC 161, *Dalpat Kumar v. Prahlad Singh*, (1992) 1 SCC 719 AIR 1993 SC 276, *Mahadeo Sawlaram Shelke v. Pune Municipal Corpn.*, (1995) 3 SCC 33, *Gujarat Bottling Co. v. Coca Cola Co.*, (1995) 5 SCC 545 AIR 1995 SC 2372, *Hindustan Petroleum Corpn. Ltd. v. Sriman Narayan*, (2002) 5 SCC 760.

155 *Shiv Kumar v. MCD* (1993) 3 SCC 161 at p. 175.

156 (1992) 1 SCC 719 AIR 1993 SC 276.

157 *Ibid.* at p. 721 (SCC) at p. 277 (AIR).

158 (1995) 5 SCC 545 AIR 1995 SC 2372.

other considerations, also look to the conduct of the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest. *These considerations will arise not only in respect of the person who seeks an order of injunction under Order 39 Rule 1 or Rule 2 of the Code of Civil Procedure, but also in respect of the party approaching the Court for vacating the ad interim or temporary injunction order already granted in the pending suit or proceedings.*<sup>159</sup> (emphasis supplied)

### (12) Injunction which may be granted

In accordance with the above principles, interim injunction of maintaining *status quo*, against transfer of property, disposal of goods, making construction, effecting recovery of dues, attachment of property, appointment of receiver or commission, against prosecution, etc., can be granted by a court.

### (13) Injunction which may not be granted

Since the power can be exercised judicially and in the public interest, no interim injunction causing administrative inconvenience or resulting in public mischief should be granted. Thus, *ordinarily* no injunction should be granted against recovery of tax or octroi, enforcement of contractual rights and liabilities, transfer or suspension of employees, delaying election process, interfering with inquiry or investigation, etc.

### (14) Inherent power to grant injunction

Rule 1 of Order 39, no doubt, enumerates circumstances in which a court may grant interim injunction. It, however, nowhere provides that no temporary injunction can be granted by the court unless the case falls within the said provision. Hence, where the case is not covered by Order 39, interim injunction can be granted by the court in exercise of inherent powers under Section 151 of the Code.<sup>160</sup>

159. *Ibid*, at p. 576 (SCC): at p. 2389 (AIR).

160. *Manohar Lal Chopra v. Seth Hiralal*, AIR 1962 SC 527; 1962 Supp (1) SCR 450; *ITO v. M.K. Mohd. Kunhi*, AIR 1969 SC 430: (1969) 2 SCR 65; *Tanusree v. Ishani Prasad*, (2008) 4 SCC 791: AIR 2008 SC 1909.

### (15) Notice: Rule 3

The court shall, before granting an injunction, give notice to the opposite party, except where it appears that the object of granting the injunction would be defeated by delay.<sup>161</sup> But the proviso added by the Amendment Act of 1976 lays down that when an *ex parte* injunction is proposed to be given, the court has to record reasons for coming to the conclusion that the object of granting injunction would be defeated by delay. In such a situation, the court shall order the applicant to send a copy of the application and other documents immediately to the opposite party. In such a case, the court shall make an endeavour to finally dispose of the application within 30 days from the date on which the *ex parte* injunction was granted. Where the court finds it difficult to dispose of the application within the period of 30 days, reasons are required to be recorded.<sup>162</sup>

An order of injunction may be discharged, varied or set aside by the court on an application being made by any party dissatisfied with such order, or where such discharge, variation or setting aside has been necessitated by a change in circumstances, or where the court is satisfied that such order has caused undue hardship to the other side.<sup>163</sup>

### (16) Ex parte injunction

Rule 3 of Order 39 requires the applicant to issue a notice to the opposite party before an injunction is granted. Though the Court has the power to grant an *ex parte* injunction without issuing a notice or granting a hearing to the party, who will be affected by such order, the said power is to be exercised sparingly and under exceptional circumstances.

In *Morgan Stanley Mutual Fund v. Kartick Das*<sup>164</sup>, the Supreme Court indicated the factors which should weigh with a court in the grant of an *ex parte* injunction:

- (i) whether irreparable or serious mischief will ensue to the plaintiff;
- (ii) whether the refusal of *ex parte* injunction would involve greater injustice than grant of it would involve;
- (iii) the court will also consider the time at which the plaintiff first had notice of the act complained of so that the making of an improper order against a party in his absence is prevented;
- (iv) the court will consider whether the plaintiff had acquiesced for sometime and in such circumstances it will not grant *ex parte* injunction;

161 R. 3; see also, *Shri Kumar v. MCD* (1993) 3 SCC 162

162 R. 3 A. 163 R. 4

164 (1994) 4 SCC 225 at p. 241-42.

- (v) the court would expect a party applying for *ex parte* injunction to show utmost good faith in making the application;
- (vi) even if granted, the *ex parte* injunction would be for a limited period of time;
- (vii) general principles like *prima facie* case, balance of convenience and irreparable loss would also be considered by the court.<sup>165</sup>

### (17) Recording of reasons

When the court purposes to grant *ex parte* injunction without issuing notice to the opposite party, proviso to Rule 3 enjoins the court to record reasons. The requirement of recording reasons is not a mere formality but a mandatory requirement.

Dealing with this aspect, in *Shiv Kumar v. MCD*<sup>166</sup>, the Supreme Court stated, "[T]he requirement for recording the reasons for grant of *ex parte* injunction cannot be held to be a mere formality. This requirement is consistent with the principle, that a party to a suit, who is being restrained from exercising a right which such party claims to exercise either under a statute or under the common law, must be informed why, instead of following the requirement of Rule 3, the procedure prescribed under the proviso has been followed. The party which invokes the jurisdiction of the court for grant of an order of restraint against a party, without affording an opportunity to him of being heard, must satisfy the court about the gravity of the situation and the court has to consider briefly these factors in the *ex parte* order. We are quite conscious of the fact that there are other statutes which contain similar provisions requiring the court or the authority concerned to record reasons before exercising power vested in them. In respect of some of such provisions it has been held that they are required to be complied with but non-compliance therewith will not vitiate the order so passed. But same cannot be said in respect of the proviso to Rule 3 of Order 39. Parliament has prescribed a particular procedure for passing of an order of injunction without notice to the other side, under exceptional circumstances. Such *ex parte* orders have far-reaching effect, as such a condition has been imposed that court must record reasons before passing such order. *If it is held that the compliance with the proviso aforesaid is optional and not obligatory, then the introduction of the proviso by Parliament shall be a futile exercise and that part of Rule 3 will be a surplusage for all practical purposes. Proviso to Rule 3 of Order 39 of the Code attracts the principle that, if a statute requires a thing to be done in a particular manner, it should be done in that manner or not at all.*"<sup>167</sup> (emphasis supplied)

165. *Ibid*, at pp. 241-42.

166. (1993) 3 SCC 161.

167. *Ibid*, at pp. 176-77 (SCC).

### (18) Imposition of conditions

Even when the court is satisfied with the case of the applicant, and is inclined to grant interim relief, it must consider the interest of the other side. The party at whose instance interim order is passed, should be made accountable for the consequences of such order. In appropriate cases, the applicant may be asked to furnish security for any increase in cost as a result of delay or damage suffered due to such interim relief. "Stay order or injunction order, if issued, must be moulded to provide for restitution."<sup>168</sup>

### (19) Doctrine of precedent

Interim orders have no precedential value and an applicant cannot claim grant of interim relief on the ground that in similar matters interim relief has been granted by the court.<sup>169</sup> Judicial comity, however, requires that in similar matters, similar interim orders should *normally* be made.<sup>170</sup>

### (20) Trespassers

While exercising discretionary and equitable power under Order 39 or under Section 151 of the Code, the court would not grant interim injunction in favour of a trespasser as against true owner of the property.

In *Dalpat Kumar v. Prahlad Singh*<sup>171</sup>, the Supreme Court stated, "It is settled law that no injunction could be granted against the owner at the instance of a person in unlawful possession".

### (21) Public projects

In many cases, injunction is sought to prevent public authorities from implementing public projects. In such cases, public interest is one of the material and relevant considerations in granting or refusing the prayer for injunction. The court must consider this aspect, and even if a case is made out to grant equitable relief of granting injunction, it must

168. *Raunaq International Ltd v I.V.R Construction Ltd.*, (1999) 1 SCC 492 at p. 503 AIR 1999 SC 393 at p. 398.

169. *Empire Industries Ltd v. Union of India*, (1985) 3 SCC 314 AIR 1986 SC 662

170. *Ibid.* at p. 344 (SCC) at p. 679 (AIR) (*per* Mukherji, J. for himself and Fazl Ali J., Varadrajan, J. *contra*), see also *Siliguri Municipality v. Amalendu Dass*, (1984) 2 SCC 436 AIR 1984 SC 653 *Bir Bajrang Kumar v. State of Bihar*, AIR 1987 SC 1345, *State of Gujarat v. Prabhat Solvent Extraction Industries (P) Ltd.*, (1982) 1 SCC 624

171. (1992) 1 SCC 719 AIR 1993 SC 276 see also *Sunil Kumar v. MCD* (1993) 3 SCC 161 *Premji Ratansevi Shah v. Union of India* (1994) 5 SCC 547 [But see *Puran Singh v. State of Punjab*, (1975) 4 SCC 518, *Ram Rattan v. State of U.P.*, (1977) 1 SCC 188 *Rame Gowda v. M. Varadappa Naidu*, (2004) 1 SC ( 769)]

adequately protect the public authority by imposing appropriate conditions on the plaintiff, including payment of compensation by him in the event of his failure in the suit.<sup>172</sup>

The need of such protection has, however, to be weighed against the corresponding need of the defendant to be protected against an injunction resulting from the exercise of his own legal rights. The court must weigh one need against another and determine where the balance of convenience lies and may pass an appropriate order in exercise of its discretionary power. Public detriment should not outweigh public interest and public benefit in granting interim orders.<sup>173</sup>

## (22) Status quo

"Status quo" means "existing condition" or "existing state of things" at any given point of time.<sup>174</sup> The relief of *status quo* is as good as an injunction. Hence, principles relating to grant of injunction apply to grant of *status quo* also.<sup>175</sup>

But the expression *status quo* is a term of ambiguity and at times gives rise to doubts and difficulties. Hence, it is proper for the court ordering *status quo* to clarify the conditions in which or subject to which the order is passed; such as, "*status quo*" as in the trial court, appellate court, High Court, or on a particular day, at a particular time, etc.<sup>176</sup>

## (23) Mandatory injunction

In appropriate cases, temporary mandatory injunction can be granted by a court but such relief can be granted only in exceptional and compelling circumstances where injury complained of is immediate and is likely to cause serious prejudice to the applicant which cannot be compensated in terms of money. In other words, mandatory injunction at an interlocutory stage can be granted in rarest of rare cases.<sup>177</sup> Again, mandatory induction can be granted only to restore *statue quo* and not to establish a new state of things.<sup>178</sup>

172. *Winki Dilawari v. Amritsar Improvement Trust*, (1996) 11 SCC 644; *Gujarat Bottling Co. Ltd. v. Coca Cola Co.*, (1995) 5 SCC 545; AIR 1995 SC 2372; *Ramnīklal N. Bhutta v. State of Maharashtra*, (1997) 1 SCC 134 at p. 140; AIR 1997 SC 1236 at pp. 1239-40.

173. *Raunaq International Ltd. v. I.V.R. Construction Ltd.*, (1999) 1 SCC 492.

174. *Bharat Coking Coal Ltd. v. State of Bihar*, 1987 Supp SCC 394 (398); AIR 1988 SC 127; *Satyabrata Biswas v. Kalyan Kumar Kisku*, (1994) 2 SCC 266; AIR 1994 SC 1837.

175. *Ibid.*

176. *Ibid.*; see also *Kishore Kumar Khaitan v. Praveen Kumar Singh*, (2006) 3 SCC 312.

177. *Dorab Cawasji Warden v. Coomi Sorab Warden*, (1990) 2 SCC 117; AIR 1990 SC 867; *Deoraj v. State of Maharashtra*, (2004) 4 SCC 697; *Kishore Kumar Khaitan v. Praveen Kumar Singh*, (2006) 3 SCC 312; AIR 2006 SC 1474.

178. *Ibid.*; see also *Bharat Petroleum Corpn. Ltd. v. Hari Chand Sachdeva*, AIR 2001 Del 307; (2001) 90 DLT 817; *Vidyawati Gupta v. Bhakti Hari Nayak*, AIR 2004 Cal 258; *Ajara*

## (24) Scope of inquiry

While dealing with an application for interim injunction, the court is bound to consider the merits of the case. But the scope of inquiry is limited to look at and consider the case *generally* and to decide whether a case has been made out by the applicant for the grant of such relief. It is certainly open to the court to consider affidavits and other documents and to draw proper inferences. The court, however, is not expected to hold "*mini-trial*" at that stage.<sup>179</sup>

## (25) Res judicata

The doctrine of *res judicata* applies to different stages of the same suit or proceeding.<sup>180</sup> Hence, if interim injunction is once granted or refused by the court, the said order will operate till the disposal of the suit or throughout the proceeding. An application for granting or vacating injunction will lie if there are changed circumstances.<sup>181</sup>

## (26) Temporary injunction: Duration

Temporary injunction granted by the court *pendente lite* (till the disposal of the suit) comes to an end when the suit is finally decided. If the suit is dismissed, injunction is vacated. But even if the suit is decreed, *temporary* injunction comes to an end. If the suit is for permanent injunction, temporary injunction granted by the court is made perpetual or permanent as a part of decree passed by the court.<sup>182</sup>

## (27) Interim relief for limited period: Effect

Where a court grants interim injunction or relief for a limited period, it comes to an end on the expiry of that period. *Normally*, in such cases, the plaintiff or his advocate requests the court for extension or continuation of such relief. But in absence of specific order, it expires.<sup>183</sup>

*Habib v. R.K. Gupta*, AIR 2002 MP 95. (2002) 2 MP LJ 384, *Surat Muni Corpn. v. Rameshchandra Shantilal Parikh*, AIR 1986 Guj 50.

179. *Anand Prasad Agarwalla v. Tarkeshwar Prasad*, (2001) 5 SCC 568, *Hindustan Petroleum Corpn Ltd v. Sriman Narayan*, (2002) 5 SCC 760. AIR 2002 SC 2598, *Kanbi Manji Khumji v. Kanbi Manjubhai Ajubhai*, AIR 1968 Guj 198. (1968) 9 Guj LR 907, *Prem Grover v. Balwant Singh*, (2006) 126 DLT 575.

180. For detailed discussion see *supra* Chap V.

181. *Ibid*, see also *Arjun Singh v. Mohindra Kumar*, AIR 1964 SC 993. (1964) 5 SCR 946, 76, 118, 122, 270, 271, 273, 278, 346, 532, 533. *Satyadhyay Ghosal v. Deorjun Debi*, AIR 1960 SC 941. (1960) 3 SCR 590.

182. *Gangappa v. Boregowda*, AIR 1955 Mys 91, *C. Kamatchi Ammal v. Kattabomman Transport Corpn Ltd*, AIR 1987 Mad 173.

183. *Luis Proto (Dr.) v. Union of India*, 1992 Supp (2) SCC 644. AIR 1992 SC 1812.

## (28) Continuation of interim relief to approach higher court

If the object of granting interim injunction or relief is to maintain and preserve *status quo* of the position which was there at the time of institution of suit, there is no reason why such position should not be allowed to be continued if the aggrieved party wants to approach higher or superior court after the matter is decided by the lower court. The court at the time of deciding the matter has power to continue interim relief till the party aggrieved gets an opportunity to approach higher forum.<sup>184</sup>

## (29) Restoration of benefits

Where a court grants interim injunction which results in injustice to the opposite party, it is not only the right but the *duty* of the court at the time of passing a final order to undo injustice and to restore the *status quo ante*.<sup>185</sup>

In *Director of Inspection (Intelligence) v. Vinod Kumar Didwania*<sup>186</sup>, against the prohibitory orders, issued by the Income Tax Authorities, the petitioner filed a writ petition and obtained an *ex parte* interim order prohibiting the authorities from enforcing the orders. The petitioner then removed his goods under the *ex parte* order and withdrew the petition.

Holding that the process of law was completely abused for the purpose of gaining an undeserved benefit, the Supreme Court held that the petitioner could not be allowed to derive an undue advantage from the situation.

Restoration of benefits, in appropriate cases, may include payment of costs, difference of price, damages, etc.<sup>187</sup>

## (30) Non-compliance with interim order

An order passed by a competent court—interim or final—has to be obeyed without any reservation. If the party against whom such order is passed feels that it is not according to law, he can take appropriate

184. *Defence Research & Development Laboratories v. C. Pandu*, AIR 1977 AP 7; *Chandigarh Admn. v. Manpreet Singh*, (1992) 1 SCC 380; AIR 1992 SC 435; *Polini v. Gray*, (1879) 12 Ch D 438; 41 LT 173 (CA).

185. *Prabodh Verma v. State of U.P.*, (1984) 4 SCC 251; AIR 1985 SC 167; *Jethabhai Khatau & Co. v. Luxmi Narayan Cotton Mills Ltd.*, (1981) 3 SCC 61; AIR 1981 SC 1201; *Dorab Cowasji Warden v. Coomji Sorab Warden*, (1990) 2 SCC 117; AIR 1990 SC 867; *Delhi Development Authority v. Skipper Construction Co. (P) Ltd.*, (1996) 4 SCC 622; AIR 1996 SC 2005; *Shree Chamundi Mopeds Ltd. v. Church of South India Trust Assn.*, (1992) 5 SCC 772; *State of Gujarat v. Dilipbhai Shaligram Patil*, (2006) 8 SCC 72; AIR 2006 SC 3091.

186. (2008) 14 SCC 91; AIR 1987 SC 1260.

187. *Raunaq International Ltd. v. I.V.R. Construction Ltd.*, (1999) 1 SCC 492 at p. 503; AIR 1999 SC 393 at p. 398.

steps to get it vacated modified or set aside. He, however, cannot refuse to obey such order. Intentional disobedience of the direction of the court would constitute contempt of court.<sup>188</sup> If a person has not obeyed the order of the court, the court may also refuse to hear him on merits.<sup>189</sup>

### (31) Appeal

An order granting or refusing to grant injunction is subject to appeal.<sup>190</sup> Where *ex parte* relief is granted by the court and the application is not decided within thirty days, the aggrieved party may prefer an appeal against such an order.<sup>191</sup>

### (32) Revision

An order granting or refusing an injunction is a "case decided" within the meaning of Section 115 of the Code and, hence, a revision lies against such an order.<sup>192</sup>

### (33) Writ petition

In case where no appeal or revision lies against an order granting or refusing temporary injunction, a writ petition under Article 226 or 227 is always maintainable.<sup>193</sup>

### (34) Supreme Court

Normally, in exercise of power under Article 136 of the Constitution, the Supreme Court does not interfere with interim orders passed by the High Courts unless there is manifest injustice or justice, equity and good conscience require interference by the Apex Court.<sup>194</sup>

### (35) Breach of injunction: Rule 2-A

Section 94(c) and Rule 2-A of Order 39 provide for the consequences resulting from a disobedience or breach of an order of injunction issued

188 For detailed discussion, see, *infra*, "Breach of injunction: Rule 2-A."

189 *Prestige Lights Ltd. v SBI*, (2007) 8 SCC 449.

190 Or 43 R 1(r).

191 *A Venkatasubbiah Naidu v. S. Chellappan*, (2000) 7 SCC 695 AIR 2000 SC 3032

192 *Firm Ishardass Devi Chand v R B Parkash Chand*, AIR 1969 SC 938. *Saharanpur Coop Cane Development Union Ltd v. Lord Krishna Sugar Mills Ltd.*, (1973) 3 SCC 719 AIR 1973 SC 1451. *Hindustan Lever Ltd v Colgate Palmolive (I) Ltd.*, (1998) 1 SCC 720. *Bina Murlidhar v. Kanhaiyalal Lokram*, (1999) 5 SCC 222. AIR 1999 SC 2171 For detailed discussion, see *infra*, "Revision".

193 *Surya Dev Rai v Ram Chandra Rai*, (2003) 6 SCC 675 AIR 2003 SC 3044

194 *Ibid*, see also Authors' *Administrative Law* (2012) Chap X.

by the court. The penalty may be either arrest of the opponent or attachment of his property or both. However, the detention in civil prison shall not exceed three months and the attachment of property shall not remain in force for more than one year.<sup>195</sup> If the disobedience or breach continues, the property attached may be sold and, out of the proceeds, the court may award such compensation as it thinks fit to the injured party.<sup>196</sup> The transferee court can also exercise this power and can punish for breach of injunction granted by the transferor court.<sup>197</sup>

### (36) Injunction on insufficient grounds: Section 95

Where in any suit in which an order of temporary injunction has been obtained by the plaintiff on insufficient grounds, or where the suit of the plaintiff fails and it appears to the court that there was no reasonable or probable ground for instituting it, on application being made by the defendant, the court may order the plaintiff to pay such amount, not exceeding fifty thousand rupees, as it deems to be a reasonable compensation to the defendant for the expense or injury including injury to reputation caused to him.<sup>198</sup>

## 8. INTERLOCUTORY ORDERS: ORDER 39 RULES 6-10

Rules 6 to 10 of Order 39 provide for making certain interlocutory orders. The court has power to order sale of perishable property in certain circumstances.<sup>199</sup>

It can also order for detention, preservation or inspection of any property which is the subject-matter of such suit.

For that purpose it can authorise any person to enter upon or into any land or building in the possession of any party for taking, samples or making observations or trying experiments.<sup>200</sup> However, before making such orders the court shall give notice to the opposite party except where it appears that the object of making such orders would be defeated by the delay.<sup>201</sup>

Where the suit land is liable to payment of revenue to government and the party in possession of such land neglects to pay revenue, any other party to the suit claiming an interest in such land may, on payment of the revenue, be put in immediate possession of the property. The court may award in the decree the amount so paid with interest thereon against the defaulter.<sup>202</sup>

195. R. 2-A(1); see also *Tayabbhai M. Bagasarwalla v. Hind Rubber Industries (P) Ltd.*, (1997) 3 SCC 443; AIR 1997 SC 1240; *Patel Rajnikant Dhulabhai v. Patel Chandrakant Dhulabhai*, (2008) 14 SCC 561; AIR 2008 SC 3016.

196. R. 2-A(2).

197. R. 2-A(1).

198. S. 95.

199. R. 6.

200. R. 7.

201. R. 8.

202. R. 9.

Where a party to a suit admits that he holds money as a trustee for another party, the court may order him to deposit such amount in court.<sup>203</sup>

## 9. RECEIVER: ORDER 40

### (1) Meaning

The term "receiver" is not defined in the Code of Civil Procedure. Stated simply, a receiver is one who receives money of another and renders account.<sup>204</sup> According to Kerr<sup>205</sup>, he is "an impartial person appointed by the court to collect and receive, pending the proceedings, the rents, issues and profits of land, or personal estate, which it does not seem reasonable to the court that either party should collect or receive, or for enabling the same to be distributed among the persons entitled". In other words, he is an independent person between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation *pendente lite*, when it does not seem reasonable to the court that either party should hold it.<sup>206</sup>

### (2) Object

The primary object of appointment of receiver is to protect, preserve and manage the property during the pendency of the litigation. A receiver is an officer and is an extended arm and hand of the court, a part of court machinery by which the rights of the parties are protected. The purpose of appointment of receiver is to preserve the suit property and safeguard interests of both the parties to the suit.<sup>207</sup>

### (3) Discretion of court

Appointment of receiver is in the discretion of the court. But the mode of appointment of receiver is recognised as one of the harshest remedies for the protection and enforcement of rights of the parties and it

203. R. 10.

204. *Concise Oxford English Dictionary* (2002) at p. 1195; P. R. Aiyar, *Advanced Law Lexicon* (2005) Vol. IV at p. 3980, Justice C.K. Thakker, *Encyclopedic Law Lexicon* (2009) Vol. IV, pp. 3984-85.

205. *Kerr on Receivers* (2001) at p. 3.

206. *T. Krishnaswamy Chetty v C. Thangavelu Chetty*, AIR 1955 Mad 430 at p. 432; *K. T. Thomas v. Indian Bank*, 1984 Supp SCC 703; *Maharaj Jagat Singh v Lt. Col. Sarwan Bhawanji Singh*, 1993 Supp (2) SCC 313, AIR 1993 SC 1721.

207. *P. Lakshmi Reddy v L. Lakshmi Reddy*, AIR 1957 SC 314, 1957 SCR 195; *Ma Hnin Yeik v K. A. R. K. Chettyar Firm*, AIR 1939 Rang 321 (FB); *Narayandas v Taraben Kalimuddin Mulla Fakhri Society*, AIR 1998 Guj 12.

should be allowed in extreme cases and in the circumstances where the interests of justice require such power to be exercised.<sup>208</sup>

#### (4) Appointment: Rule 1(a)

Where it appears to the court to be just and convenient, it may appoint a receiver.<sup>209</sup> The principles followed by the Chancery Courts in England for the appointment of receivers are adopted by Indian courts also. Courts in India have very wide jurisdiction to appoint as well as to remove a receiver in the exercise of their discretion.

The discretion, however, is not absolute, arbitrary and unregulated. It is a sound and judicial discretion and must be exercised cautiously, judicially and after taking into account all the circumstances of the case for the purpose of serving the ends of justice and protecting the rights of all the parties interested in the controversy.<sup>210</sup>

#### (5) Principles

The following principles must be borne in mind before a receiver is appointed by a court:<sup>211</sup>

- (i) The appointment of a receiver is a discretionary power of the court.
- (ii) It is a protective relief. The object is preservation of the property in dispute pending a judicial determination of the rights of the parties to it.
- (iii) A receiver should not be appointed unless the plaintiff *prima facie* proves that he has very excellent chance of succeeding in the suit.
- (iv) It is one of the harshest remedies which the law provides for the enforcement of rights, and therefore, should not be lightly resorted to. Since it deprives the opposite party possession of property before a final judgment is pronounced, it should only be granted for the prevention of a manifest wrong or injury. A court will never appoint a receiver merely on the ground that it will do no harm.

208. *Benoy Krishna v. Satish Chandra*, AIR 1928 PC 49; ILR 1951 Mys 55 (FB); *ICICI v. Karnataka Ball Bearing Corpn.*, (1999) 7 SCC 488; AIR 1999 SC 3133; *Parmanand Patel v. Sudha A. Chowgule*, (2009) 11 SCC 127; AIR 2009 SC 1593.

209. Or. 40 R. 1(1)(a); see also, S. 94(d).

210. *T. Krishnaswamy Chetty v. C. Thangavelu Chetty*, AIR 1955 Mad 430 at p 434; *Hiralal Patni v. Loonkaran Sethiya*, AIR 1962 SC 21; (1962) 1 SCR 868.

211. *T. Krishnaswamy Chetty v. C. Thangavelu Chetty*, AIR 1930 Mad 430, at pp. 434-35; *Srinivasa Rao v. Baburao*, AIR 1970 Mys 141; *Bokaro & Ramgur Ltd. v. State of Bihar*, AIR 1966 Pat 154; *S.B. Industries v. United Bank of India*, AIR 1978 All 189 at p 190-91; *Krishna Kumar v. Grindlays Bank P.L.C.*, (1990) 3 SCC 669; AIR 1991 SC 899.

- (v) Generally, an order appointing a receiver will not be made where it has the effect of depriving the defendant of a *de facto* possession, since that might cause irreparable loss to him. But if the property is shown to be *in medio*, that is to say, in enjoyment of no one, it will be in the common interest of all the parties to appoint a receiver.
- (vi) The court should look at the conduct of the party who makes an application for appointment of a receiver. He must come with clean hands and should not have disintitiled himself to this equitable relief by laches, delay or acquiescence.

### (6) Who may apply?

Generally, an application for appointment of receiver is made by the plaintiff in a properly constituted suit. But a defendant may also apply for appointment of receiver if it is "just and convenient". Normally, a stranger or a third party cannot apply for appointment of receiver. But if he is interested in realisation, management, protection, preservation or improvement of property, he may also make such application. A court may also exercise *suo motu* power to appoint a receiver,<sup>212</sup> though a contrary view has also been taken.<sup>213</sup>

### (7) Who may appoint receiver?

A receiver may be appointed by the court before which the proceedings are pending. Thus, in case of a suit, receiver can be appointed by the trial court. Where an appeal is preferred against the decree passed by the trial court, it is the appellate court which has power to appoint receiver.

A court, however, cannot appoint a receiver *suo motu*.<sup>214</sup>

### (8) Who may be appointed as receiver?

A person who is independent, impartial and totally disinterested should normally be appointed as receiver. Generally, a party to the suit (plaintiff or defendant) should not be appointed as receiver by the court. But the rule is not rigid or inflexible. In exceptional circumstances or for

212. For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn) Vol. VI Or. 40.

213. *Mahendra v. Ram Narayan*, (2000) 9 SCC 190, AIR 2000 SC 3569.

214. *Mahendra H. Patel v. Ram Narayan*, (2000) 9 SCC 190, AIR 2000 SC 3569 (1), 2000 AIR SCW 3688, *Ramchandra Jeetmal v. Jeetmal Ganpat Potwal*, AIR 1962 MP 380, *Parshotam Das v. Prem Narain*, AIR 1956 All 665. [But see, "Who may apply?", *supra*]

special reasons, a party to a suit or proceeding can also be appointed as receiver.<sup>215</sup>

### (9) Notice

The Code does not provide for issue of notice before appointment of receiver by the court. On principles also, notice to opposite party cannot be held to be indispensable. In some cases, the very object of appointment of receiver may be defeated if notice to opposite party is insisted upon.<sup>216</sup>

It has, therefore, been held that in urgent cases or emergent situations, *ex parte* order of appointment of receiver can be made, but final order can only be passed after hearing the parties.<sup>217</sup> This is also in consonance with the doctrine of *audi alteram partem* ("hear the other side").<sup>218</sup>

### (10) Duration

The Code does not prescribe any time limit or duration for receivership. It may, however, be stated that where a receiver is appointed for a limited period, his appointment comes to an end on expiration of that period. If the appointment is until judgment or decree, it is brought to an end by judgment or decree. The court has ample power to continue the receiver even after final decree if the exigencies of the case so require.<sup>219</sup>

### (11) Powers: Rule 1(d)

A receiver is an officer or representative of the court and he functions under its directions.<sup>220</sup> The court may confer upon the receiver any of the following powers:

215. *Kasturi Bai v. Anguri Chaudhary*, (2001) 3 SCC 176; AIR 2001 SC 1361; *Indira Transport v. Rattan Lal*, AIR 1998 Del 2; *Ganpat v. Prahlad*, AIR 1952 Nag 253; *Jasoda v. Satyabhama*, AIR 1965 Ori 28.
216. *Asadali Chowdhury v. Mohd. Hossain Chowdhury*, AIR 1916 Cal 427; *Dilman Rai v. Srinarayan Sharma*, AIR 1983 Sik 11.
217. *Ibid*; see also *A.R.N. Chinna Narayanan v. Sree Shyam Sayee Corpn.*, (1991) 2 LW 260 (Mad).
218. For detailed discussion of *audi alteram partem*, see, *Authors' Administrative Law* (2012) Lecture VI.
219. *Hirala Patni v. Loonkaran Sethiya*, AIR 1962 SC 21 (1962) 1 SCR 868.
220. *Hiralal Patni v. Loonkaran Sethiya*, AIR 1962 SC 21. (1962) 1 SCR 868; *P. Lakshmi Reddy v. L. Lakshmi Reddy*, AIR 1957 SC 314; 1957 SCR 195; *Sadhuram Bansal v. Pulin Behari*, (1984) 3 SCC 410; AIR 1984 SC 1471; *Balkrishnan Gupta v. Swadeshi Polytex Ltd.*, (1985) 2 SCC 167 at pp. 192-93; AIR 1985 SC 520 at p. 534.

- (i) to institute and defend suits;
- (ii) to realize, manage, protect, preserve and improve the property;
- (iii) to collect, apply and dispose of the rents and profits;
- (iv) to execute documents; or
- (v) such of these powers as it thinks fit.<sup>221</sup>

But he has no power except such as are conferred upon him by the order by which he was appointed. It is open to a court not to confer all of the above powers. They are conditioned by the terms of his appointment.<sup>222</sup> But even when full powers are conferred on him, he should take the advice of the court in all important matters if he wants to protect himself.<sup>223</sup>

A receiver cannot sue or be sued without the leave of the court.<sup>224</sup> However, grant of leave is the rule and refusal an exception.<sup>225</sup> But if the suit is filed without such leave, it is liable to be dismissed. If the decree is passed in such suit, it can be set aside.<sup>226</sup> No such sanction is, however, necessary to prosecute the receiver for a criminal offence alleged to have been committed by him by abusing his authority as receiver.<sup>227</sup>

Since he is *custodia legis*, any obstruction or interference by anyone with his possession without the leave of the court is interference with the court's proceedings and is liable for contempt of court.<sup>228</sup> Property in the hands of a receiver cannot be attached without the leave of the court.<sup>229</sup>

A receiver is entitled to the remuneration fixed by the court for the services rendered by him.<sup>230</sup> A receiver is entitled to be indemnified for the debts incurred or contracts entered into by him in the course of management of the estate.

The status of a receiver has been appropriately explained in the leading case of *Jagat Tarini Dasi v. Naba Gopal Chaki*<sup>231</sup> in the following words:

221. R 1(1)(d). *Harinagar Sugar Mills Co. Ltd. v High Court of Bombay*, AIR 1966 SC 1707 (1966) 3 SCR 948.

222. *S.B. Industries v. United Bank of India*, AIR 1978 All 179, *Krishna Kumar v Grindlays Bank P.L.C.*, (1990) 3 SCC 669 AIR 1991 SC 899.

223. *Balbir Anand v. Ram Jawaya*, AIR 1960 Raj 192 at p. 195

224. *Kanhayyalal v. Dr D R Banaji*, AIR 1958 SC 725 1959 SCR 333, *Everest Coal Co. (P) Ltd v State of Bihar*, (1978) 1 SCC 12 AIR 1977 SC 2304.

225. *S B Industries v United Bank of India*, AIR 1978 All 179, *Krishna Kumar v Grindlays Bank P.L.C.*, (1990) 3 SCC 669 AIR 1991 SC 899

226. *Ibid.*

227. *Khimchand Narottam Bhavsar, Re*, AIR 1928 Bom 493 ILR (1928) 52 Bom 898 *K Shyamalambal v M S Ramamurthi* AIR 1948 Mad 318

228. *S B Industries v United Bank of India*, AIR 1978 All 179, *Krishna Kumar v Grindlays Bank P.L.C.* (1990) 3 SCC 669 AIR 1991 SC 899

229. *Kanhayyalal v Dr D R Banaji* AIR 1958 SC 725

230. R 2

231. ILR (1907) 34 Cal 305

"The receiver is appointed for the benefit of all concerned; he is the representative of the court, and of all parties interested in the litigation, wherein he is appointed. He is the right arm of the court in exercising the jurisdiction invoked in such cases for administering the property; the court can only administer through a receiver. For this reason, all suits to collect or obtain possession of the property must be prosecuted by the receiver, and the proceeds received and controlled by him alone."<sup>232</sup>

### (12) Duties: Rule 3

A receiver has to furnish such security, as the court thinks fit, duly to account for what he shall receive in respect of the property. He has to submit accounts for such period and in such forms as the court directs. He has to pay the amount due from him as per the direction of the court.<sup>233</sup> Being a representative of the court, he is bound to discharge his duties personally and cannot delegate or assign any of his rights or duties entrusted to him by the court.<sup>234</sup>

### (13) Liabilities: Rule 4

If the receiver fails to submit accounts, or fails to pay the amount due, or occasions loss to the property by his wilful default or negligence, the court may direct his property to be attached and sold and make good any amount found to be due from him.<sup>235</sup> A receiver is bound to exercise the same diligence in keeping down expenses and in caring for the estate in his possession as a prudent man would observe in connection with his own property under similar circumstances.<sup>236</sup>

Thus, he is not only responsible for sums actually received by him but also for all sums which he might have received but for his default or negligence. Where he fails to pay the amount ordered by the court, the court would be justified in directing the attachment and sale of his property. The court has also an inherent power to remove the receiver appointed by it, when he does not comply with the orders of the court or abuses his powers or authority.<sup>237</sup>

232. See also *Kurapati Venkata v. Thondepu Ramaswami & Co.*, AIR 1964 SC 818; 1963 Supp (2) SCR 995; *Balkrishan v. Swadeshi Polytex Ltd.*, (1982) 2 SCC 167.

233. R. 3.

234. *Balaji v. Ramchandra*, ILR (1895) 19 Bom 660.

235. R. 4.

236. *Mohini v. Sarkar*, AIR 1941 Cal 144

237. *Rani Mathusri Jijai Amba, ex p.*, ILR (1890) 13 Mad 390 (PC); *K T. Thomas v Indian Bank, supra*; see also *Krishna Kumar v. Grindlays Bank P.L.C.*, (1990) 3 SCC 669.

### (14) Appeal

An order appointing or refusing to appoint a receiver is appealable.<sup>238</sup>

### (15) Revision

An order passed on an application for appointment of receiver by allowing the application or rejecting such application is a "case decided" within the meaning of Section 115 of the Code. Hence, where no appeal lies, a revision is competent and maintainable.<sup>239</sup>

<sup>238</sup> Or 41 R 1(s)

<sup>239</sup> *Kanhaiya v Kanhaiya Lal*, AIR 1924 All 376; ILR (1924) 46 All 372; 79 IC 363; *Global Plastics and Chemicals India (P) Ltd v Gian Kaur*, (1993) 2 P LR 477.

# CHAPTER 12

## Withdrawal and Compromise of Suits

### SYNOPSIS

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### 1. GENERAL

Order 23 deals with withdrawal and compromise of suits. It provides for two types of withdrawals:

- (i) Absolute withdrawal, i.e. withdrawal without the leave of the court; and
- (ii) Qualified withdrawal, i.e. withdrawal with the leave of the court.

It declares the effect of withdrawals. The Order also provides for compromise of suits and effect thereof.

## 2. WITHDRAWAL OF SUIT: ORDER 23 RULES 1-2

### (a) Withdrawal without leave of court: Rule 1(1), (4)

Rule 1(1) provides for withdrawal of suit without the leave of the court. It states that at any time after the institution of a suit, the plaintiff may abandon his suit or abandon a part of his claim against all or any of the defendants without the leave of the court.<sup>1</sup> This right is absolute and unqualified and the court cannot refuse permission to withdraw a suit and compel the plaintiff to proceed with it,<sup>2</sup> unless any vested right comes into existence before such prayer is made.<sup>3</sup> However, in case of such abandonment or withdrawal of a suit or part of a claim without the leave of the court, the plaintiff will be precluded from instituting a fresh suit in respect of the same cause of action.<sup>4</sup>

The principle underlying Order 23 Rule 1 is that once a plaintiff invokes the jurisdiction of the court and institutes a suit, he cannot be permitted to institute a fresh suit in respect of the same subject-matter again if he abandons such suit without the permission of the court to file fresh suit. "The law confers, upon a man no rights or benefits which he does not desire" (*Invito beneficium non datur*)<sup>5</sup>. The plaintiff also becomes liable for such costs as the court may award to the defendant.<sup>6</sup>

Rule 1-A of Order 23 as added by the Amendment Act of 1976 provides for the circumstances under which the defendant may be allowed to be transposed as a plaintiff where the suit is withdrawn by the plaintiff.<sup>7</sup>

### (b) Withdrawal with leave of court: Rule 1(3)

Rule 1(3) permits withdrawal of suit with the leave of the court.

#### (i) Grounds

Where the court is satisfied that a suit must fail by reason of some formal defect, or there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may grant permission to withdraw such suit or such part of the claim

1 Or 23 R 1(1)

2 *Byayanaanda Patnaik v Satrugna Sabu*, AIR 1963 SC 1566 at p. 1571 (1964) 2 SCR 538; *Hulas Rai v. Firm K B. Bass & Co.*, AIR 1968 SC 111 at p. 113 (1967) 3 SCR 886; *K. S. Bhoopathy v Kokila*, (2000) 5 SCC 458; AIR 2000 SC 2132

3 *R. Ramamurthi v V. Rajeswara*, (1972) 2 SCC 721; AIR 1972 SC 643

4 R 1(4) see also *Sarguja Transport Service v. STAT* (1987) 1 SCC 5; AIR 1987 SC 88; *Upadhyay & Co. v. State of U.P.*, (1999) 1 SCC 81; AIR 1999 SC 539

5 *Sarguja Transport Service v. STAT*, (1987) 1 SCC 5 at pp. 10-11 (SCC)

6 R 1(4) see also *Konkan Trading Co. v. Suresh Gormid*, (1986) 2 SCC 424; AIR 1986 SC 1009

7 R 1-A, see also *R. Rathinavel Chettiar v. V. Sivaraman*, (1999) 4 SCC 89

with liberty to file a fresh suit in respect of the subject-matter of such suit or such part of the claim on such terms as it thinks fit.<sup>8</sup>

Such permission may be granted by the court on the following grounds:

(1) *Formal defect*.—Though the expression “formal defect” has not been defined in the Code, it connotes some defect of form or procedure not affecting the merits of the case<sup>9</sup>; such as want of statutory notice under Section 80 of the Code, misjoinder of parties or of causes of action, non-payment of proper court fee or stamp fee, failure to disclose cause of action, mistake in not seeking proper relief, improper or erroneous valuation of the subject-matter of the suit, absence of territorial jurisdiction of the court, defect in prayer clause, etc.<sup>10</sup>

But a defect affecting the merits of the case, or a defect which goes to the root of the plaintiff's case cannot be said to be a formal defect,<sup>11</sup> e.g. non-joinder of a necessary party, omission to substitute heirs, omission to include all the causes of action in the plaint, non-registration of a partnership firm, bar of limitation, deliberate undervaluation of the subject-matter of the suit, addition of a new factual plea, failure to bring legal representatives on record, non-examination of material witnesses, insufficiency of evidence, filing of representative suit without following procedure prescribed by Order 1 Rule 8 etc.<sup>12</sup>

(2) *Sufficient grounds*.—The expression “sufficient grounds” need not generally be construed *ejusdem generis* (of the same kind or nature) with formal defect.<sup>13</sup> For instance, where the suit was premature, or it had

8 R 1(3)

9. *Ramrao Bhagwantrao v. Babu Appanna*, AIR 1940 Bom 121 (FB), *Khatuna v. Ramsewak Kashinath*, AIR 1986 Ori 1.

10. *Certificate Officer v. Kasturi Chand*, AIR 1970 Ori 239; *Brajamohan Sabato v. Sarojini Panigrahi*, AIR 1975 Ori 39, *Atul Krushna v. Rajukishore*, AIR 1956 Ori 77; *Tata Iron & Steel Co. v. Arun Chandra*, AIR 1967 AP 246; *S H. Kelkar v. Mandakini Bai*, AIR 1970 Mys 163, *Beniram v. Gaiind*, (1981) 4 SCC 209. AIR 1982 SC 789.

11. *Robert Watson & Co. v. Collector of Zillah Rajshahye*, (1869-70) 13 MIA 160 (PC); *Dwarka Agarwalla v. Sashi Babha*, (1966) 32 Cut LT 864; *Harikrishna v. State of Orissa*, (1976) 42 Cut LT 339; *Raja Srinath Roy v. Dinabandhu Sen*, AIR 1914 PC 48.

12. *Ramrao Bhagwantrao v. Babu Appanna*, AIR 1940 Bom 121, *Khatuna v. Ramsewak Kashinath*, AIR 1986 Ori 1; *Haridas v. Giridhari*, AIR 1934 Cal 59; *Muktanath Tewari v. Vidyashanker Dube*, AIR 1943 All 67, *Asian Assurance Co Ltd. v. Madholal Sindhu*, AIR 1950 Bom 378, *Tarachand v. Gaibhaji Ahmed*, AIR 1956 Bom 632, *Trinath Parida v. Sobha Bholaini*, AIR 1973 Ori 37; *Savitri Devi v. Hira Lal*, AIR 1977 HP 91, *T K. Prabhawati (Dr) v. C P. Umma Kunhathabi*, AIR 1981 Ker 170; *Khatuna v. Ramsewak*, AIR 1986 Ori 1; *Kannuswami Pillai v. Jagathambal*, ILR (1918) 41 Mad 701, *Prabhat Chandra Saikia v. Rajani Bala*, AIR 1972 Gau 85. (1997) 99 Bom LR 450; *Santosh Kumar v. Khedkar Mota and Co*, 2001 AIHC 2840.

13. *Tarachand case*, AIR 1956 Bom 632, *Sukham v. Liquidator, Coop Society*, AIR 1944 Nag 183; *Eleavarthi Nadipatha v. Eleavarthi Pedda Venkataraju*, AIR 1966 Mad 346, *Radha Krishna v. State of Rajasthan*, AIR 1977 Raj 131, *Atul v. Raj Kishore*, AIR 1956 Ori 77, *Brij Mohan v. Sarojini*, AIR 1975 Ori 39.

become infructuous, or where the plaintiff felt that the defendant was absent and even if the decree was passed, it could not be executed, or where two suits were filed and due to mistake both were withdrawn, or there was omission to file Power of Attorney, it was held to be a sufficient ground. Wide and liberal meaning should be given to the expression "sufficient grounds" by exercising power in the interest of justice (*ex debito justitiae*).<sup>14</sup>

But, the power cannot be exercised where the plaintiff was not ready to conduct the suit; or where no notice was served to the defendant due to death, etc.

### (ii) Effect of leave

It is in the discretion of the court to grant such permission and it can be granted by the court either on an application of the plaintiff or even *suo motu*. Such permission may be granted on such terms as to costs, etc. as the court thinks fit. The granting of permission to withdraw a suit with liberty to file a fresh suit removes the bar of *res judicata*. It restores the plaintiff to the position which he would have occupied had he brought no suit at all.

### (c) Suit by minor: Rule 1(2)

By the Amendment Act of 1976, a specific provision has been made that where the plaintiff is a minor, neither the suit nor any part of the claim can be abandoned without the leave of the court.<sup>15</sup> Sub-rule (2) of Rule 1 enacts that an application for leave under the proviso to sub-rule (1) of Rule 1 must be accompanied by an affidavit of the next friend and also, if the minor or such person is represented by a pleader, by a certificate of the pleader to the effect that the proposed abandonment is, in his opinion, for the minor's benefit.

### (d) Withdrawal by one of the plaintiffs: Rule 1(5)

Where there are two or more plaintiffs in a suit, the suit or part of the claim cannot be abandoned or withdrawn without the consent of all the plaintiffs.<sup>16</sup> One of such plaintiffs, however, may abandon or withdraw from the suit to the extent of his own interest in it.

14 *Benram v Gaiind*, (1981) 4 SCC 209 AIR 1982 SC 789, *Konkan Trading Co. v Suresh Gorind*, (1986) 2 SCC 424 AIR 1986 SC 1009, *K S Bhoopathy v Kokila*, (2000) 5 SCC 458 AIR 2000 SC 2132.

15 Proviso to R. 1(1) See also *infra* Chap. 16

16 R. 1(5)

### (e) Limitation: Rule 2

A plaintiff withdrawing a suit with liberty to file a fresh suit is bound by the law of limitation in the same manner as if the first suit has not been filed at all.<sup>17</sup>

### (f) Applicability to other proceedings

#### (i) Appeals

Appeal is a continuation of suit.<sup>18</sup> The provisions of this Order therefore, apply to withdrawal of appeals.<sup>19</sup> The appellant has a right to withdraw his appeal unconditionally and if he makes such an application, the court must grant it, subject to costs, and has no power to say that it will not permit the withdrawal and will go on with the hearing of the appeal.<sup>20</sup> In appropriate cases, an appellate court may grant permission to withdraw the suit. This is based on the principle that an appeal is continuation of suit. This power, however, can be exercised if there is no adjudication on merits in favour of defendant(s) by the trial court. If any finding recorded by the trial court in favour of the defendant(s) is nullified or gets obliterated by withdrawal of the suit, no such permission can be granted.<sup>21</sup>

The appellate court may also grant permission to withdraw a suit with liberty to file a fresh suit.<sup>22</sup> Such power, however, has to be exercised sparingly and cautiously.<sup>23</sup>

#### (ii) Revisions

The revisional jurisdiction of a High Court is a part of appellate jurisdiction of the High Court. Basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense.<sup>24</sup>

17. R. 2. See also, S. 14(3), Limitation Act, 1963.

18. For detailed discussion, see *infra*, Pt. III, Chap. 2.

19. *Bijayananda Patnaik v. Satrughna Sabu*, AIR 1963 SC 1566 at p. 1964; (1964) 2 SCR 538; *Ammuni Kutty v. George Abraham*, AIR 1987 Ker 246.

20. *Bijayananda Patnaik v. Satrughna Sabu*, AIR 1963 SC 1566 at p. 1571; (1964) 2 SCR 538.

21. *Executive Officer, Arthanaheswarar Temple v. R. Sathyamoorthy*, (1999) 3 SCC 115; AIR 1999 SC 958; *R. Rathinavel Chettiar v. V. Sivaraman*, (1999) 4 SCC 89; *K S Bhoopathy v. Kokila*, (2000) 5 SCC 458; AIR 2000 SC 2132.

22. *Suraj Pal Singh v. Gharam Singh*, AIR 1973 All 466. See also *infra*, S. 107(2), Pt. III, Chaps. 2, 3.

23. *Eleavarthi Nadipatha v. Eleavarthi Pedda Venkataraju*, AIR 1966 Mad 346.

24. *Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat*, (1969) 2 SCC 74, see *infra*, Pt. III, Chaps. 2, 9.

So far as the provisions of Order 23 of the Code are concerned, it has been held in some cases that they apply to withdrawal proceedings<sup>25</sup> but a contrary view has also been taken.<sup>26</sup>

### (iii) Representative suits

Where the plaintiff sues in a representative character, he cannot abandon or withdraw the suit or a part of the claim. He may, however, get out of the suit, but that does not put an end to the litigation where other persons are interested in it and have a right to come in and continue the litigation.<sup>27</sup>

### (iv) Writ petitions

The general principles for withdrawal of suits also apply to petitions under Article 226 or Article 32 of the Constitution. Ordinarily, therefore, a High Court or the Supreme Court would not refuse the prayer of the petitioner or his advocate to allow him to withdraw the petition, if such withdrawal is unconditional.<sup>28</sup> But he cannot thereafter institute a fresh petition on the same cause of action.<sup>29</sup>

But if such writ petition is withdrawn on objections by Registry, or on some technical defect or logistic problem or availability of alternative remedy or such formal objection, fresh petition will not be barred.<sup>30</sup>

### (v) Execution proceedings

The provisions of Order 23 do not apply to execution proceedings.<sup>31</sup> The court has no power to allow an application for execution to be withdrawn with liberty to file a fresh application. Withdrawal of an application without the permission of the court to bring a fresh application,

25. *Moosa Suleman v Hanuman Idol*, 1979 Bom CR 214.

26. *Manhar Lal v. Meena Agencies*, (1986) 2 Guj LR 1079. 1986 Bom Rent Cas 106, *Mahabir Prasad v. Ramchandra Prasad*, AIR 1979 NOC 57 (Pat). 1978 BLJ 390

27. *Asian Assurance Co Ltd v Madholal Sindhu*, AIR 1950 Bom 378, *Sheela Barse v Union of India*, (1988) 4 SCC 226 AIR 1988 SC 2211. For detailed discussion of "Representative suit", see *supra*, Chap 5

28. *Daryao v State of U P.*, AIR 1961 SC 1457 (1962) 1 SCR 574. *Gulabchand Chhotatal Parikh v. State of Gujarat*, AIR 1965 SC 1153 (1965) 1 SCR 547 For detailed discussion, see *supra*, "Withdrawal of petitions"

29. *Sarguja Transport Service v STAI*, (1987) 1 SCC 5 AIR 1987 SC 88 *Sahdeo Jha v Union of India*, (1992) 2 SCC 190 (1992) 20 ATC 207, *Upadhyay & Co. v State of U P.*, (1999) 1 SCC 81 AIR 1999 SC 509

30. *Ramesh Chandra Sankla v Vikram Cement* (2008) 14 SCC 58 *Harviana State Coop Land Development Bank v Neelam*, (2005) 5 SCC 91 AIR 2005 SC 1842 For detailed discussion and case law, see, V.G. Ramachandran, *Law of Writs* (2006) Vol I, Pt II Chap 6

31 R 4

hence is no bar to a fresh application for execution within the period of limitation.<sup>32</sup>

### (g) Restoration of benefits

While granting permission to withdraw the suit with or without the leave of the court, it is the duty of the court to ensure that if the plaintiff has obtained any benefit by virtue of interim order or otherwise, the plaintiff restores those benefits.<sup>33</sup>

### (h) Fresh suit

Where the plaintiff withdraws his suit unconditionally without the leave of the court he cannot institute fresh suit in respect of the same subject-matter.<sup>34</sup> But where he withdraws the suit with the leave of the court, fresh suit for the same subject-matter is not barred.<sup>35</sup>

### (i) Appeal

An order granting or refusing permission to withdraw the suit with permission to file fresh suit on the same cause of action is neither a "decree" nor an appealable order. Hence, no appeal lies against such order.

### (j) Revision

An order granting or refusing permission to withdraw the suit with permission to file fresh suit on the same cause of action can be said to be a "case decided" under Section 115 of the Code. Such order is, therefore, revisable.

## 3. COMPROMISE OF SUIT: RULES 3-3-B

### (a) General

After the institution of the suit, it is open to the parties to compromise, adjust or settle it by an agreement or compromise.<sup>36</sup> The general

32. *Palaniandi Pillai v. Papathi Ammal*, AIR 1914 Mad 1: 15 Mad LT 100; *Hardit Singh v. Surinder Nath*, AIR 1982 Del 588; *Jai Prakash v. Khimraj*, AIR 1991 Raj 136; (1999) 2 Mad LJ 781.

33. *Director of Inspection (Intelligence) v. Vinod Kumar Didwania*, (2008) 14 SCC 91: AIR 1987 SC 1260. For detailed discussion, see, Chap. 11, *supra*.

34. R. 1(4). 35. R. 1(3).

36. *Moti Lal Banker v. Maharaj Kumar Mahmood Hasan Khan*, AIR 1968 SC 1087: (1968) 3 SCR 158.

principle is that all matters which can be decided in a suit can also be settled by means of a compromise.<sup>37</sup>

Rule 3 of Order 23 lays down that (i) where the court is satisfied that a suit has been adjusted wholly or in part by any lawful agreement in writing and signed by the parties; or (ii) where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall record such agreement, compromise or satisfaction and pass a compromise decree accordingly.<sup>38</sup>

### (b) Conditions

Following conditions must be satisfied before a consent decree is passed:

- (i) There must be an agreement or compromise;
- (ii) It must be in writing and signed by the parties;
- (iii) It must be lawful;
- (iv) It must be recorded by the court; and
- (v) A compromise (consent) decree must have been passed.

### (c) Who may record compromise?

A compromise, adjustment or satisfaction may be recorded by the court where the proceedings are pending. In case of suit, it can be recorded by the trial court. In case of appeal or revision, such action can be taken by appellate or revisional court. Where compromise has been arrived at in execution proceedings, it is the executing court which can record such compromise.

### (d) Who may challenge compromise?

A party to a compromise may challenge it *inter alia* on the ground that there is no compromise or agreement, or it is not in writing or signed by him. The court recording the compromise must decide such question.<sup>39</sup>

### (e) Applicability to other proceedings

Order 23, Rule 3 of the Code applies to civil suits. But the underlying principle of the said provision applies to other proceedings also.<sup>40</sup>

37. *K.K. Chari v. R M Seshadri*, (1973) 1 SCC 761 at p. 777. AIR 1973 SC 1311 at p 1323, *Hiralal Moolchand v. Barot Raman Lal*, (1993) 2 SCC 458; AIR 1993 SC 1449, *Prithvichand v. S Y. Shinde*, (1993) 3 SCC 271; AIR 1993 SC 1929.

38. *Gurpreet Singh v. Chatur Bhuj*, (1988) 1 SCC 270; AIR 1988 SC 400, *Byram Pestonji v Union Bank of India*, (1992) 1 SCC 31; AIR 1991 SC 2234, *Rachakonda Venkat v R Satya Bai* (1996) 1 SCC 671.

39. Proviso to R 3.

40. For detailed discussion and case law, see, *Authors' Code of Civil Procedure (Lawyers' Edn.)* Vol V at pp 256-65.

### (f) Satisfaction of court

It is the duty of the court to satisfy itself with regard to the terms of agreement. The court must be satisfied that the agreement is lawful and it can pass a decree in accordance with it. The court should also consider whether such a decree can be enforced against all the parties to the compromise.

A court passing a compromise decree performs a judicial act and not a ministerial act. Therefore, the court must satisfy itself by taking evidence or on affidavits or otherwise that the agreement is lawful. If the compromise is not lawful, an order recording compromise can be recalled by the court.<sup>41</sup> In case of any dispute between the parties to the compromise, it is the duty of the court to inquire into and decide whether there has been a lawful compromise in terms of which the decree should be passed. An agreement or compromise which is void or voidable under the Indian Contract Act, 1872, shall not be deemed to be lawful within the meaning of Rule 3.<sup>42</sup>

The court in recording compromise should not act in a casual manner. Where it is alleged by one party that a compromise has not been entered into or is not lawful, it is the duty of the court to decide that question.<sup>43</sup>

### (g) Compromise on behalf of minor

No next friend or guardian of a minor shall, without the leave of the court, enter into any agreement or compromise on behalf of the minor with reference to the suit, unless such leave is expressly recorded in the proceedings.<sup>44</sup>

### (h) Compromise by pleader

A pleader stands in the same position as his client with regard to his authority to compromise the suit. An advocate appearing for a party, therefore, has always an implied authority to enter into a compromise on behalf of his client.<sup>45</sup>

41. *Banwari Lal v. Chando Devi*, (1993) 1 SCC 581; AIR 1993 SC 1139.

42. Expln. to R. 3; *Banwari Lal v. Chando Devi*, (1993) 1 SCC 581; *Ruby Sales & Services (P) Ltd. v. State of Maharashtra*, (1994) 1 SCC 531.

43. *Banwari Lal v. Chando Devi*, (1993) 1 SCC 581.

44. Or. 32 Rr. 6, 7. See also *infra*, Chap. 16.

45. For detailed discussion, see *supra*, Chap. 7.

### (i) Representative suit: Rule 3-B

No agreement or compromise in a representative suit can be entered into without the leave of the court. Before granting such leave, notice to the persons interested should be given by the court.<sup>46</sup>

### (j) Compromise decree and *res judicata*

A compromise decree is not a decision of the court. It is acceptance by the court of something to which the parties had agreed. A compromise decree merely sets the seal of the court on the agreement of the parties. The court does not decide anything. Nor can it be said that a decision of the court is implicit in it. Hence, a compromise decree cannot operate as *res judicata*.<sup>47</sup> In some cases, however, it is held that a consent decree would also operate as *res judicata*.<sup>48</sup>

It is submitted that the former view is correct since, in a consent decree, it cannot be said that a suit is heard and finally decided by the court on merits. Such a decree, however, may create an estoppel between the parties.<sup>49</sup>

### (k) Compromise decree and estoppel

A compromise decree is not a decision on merits as it cannot be said that the case was "heard and finally decided". Nevertheless, it is based on consent or compromise of parties and, therefore, will operate as an estoppel.<sup>50</sup>

### (l) Execution of compromise decree

A consent decree is executable in the same manner as an ordinary decree.<sup>51</sup> But if the decree gives effect to an unlawful compromise or is

46. R 3-B; see also *Atma Ram v. Beni Prasad*, AIR 1935 PC 185

47. *Pulavarthi Venkata v. Valluri Jagannadha*, AIR 1967 SC 591 at pp. 594-95 (1964) 2 SCR 310

48. *Shankar v. Balkrishna*, AIR 1954 SC 352. (1955) 1 SCR 99. *Kumar Sudhendu Narain v. Renuka Biswas*, (1992) 1 SCC 206 at pp. 214-15. AIR 1992 SC 385 at p. 391. *Byram Pestonji v. Union Bank of India*, (1992) 1 SCC 31 at p. 48

49. *Pulavarthi Venkata v. Valluri Jagannadha*, AIR 1967 SC 591 at pp. 594-95 (1964) 2 SCR 310. *Sailendra Narayan Bhanja Deo v. State of Orissa*, AIR 1956 SC 346. 1956 SCR 72. *Mohanlal Goenka v. Benoy Krishna*, AIR 1953 SC 65. 1953 SCR 377. *Byram Pestonji v. Union Bank of India* (1992) 1 SCC 31.

50. *Shankar v. Balkrishna*, AIR 1954 SC 352. (1955) 1 SCR 99. *Sunderahar v. Devaji Shankar Deshpande*, AIR 1954 SC 82. *Sailendra Narayan Bhanja Deo v. State of Orissa*, AIR 1956 SC 346. 1956 SCR 72. *Prithiichand v. S Y. Shinde* (1993) 3 SCC 271. AIR 1993 SC 1929

51. *Moti Lal Banker v. Maharaj Kumar Mahmood Hasan Khan*, AIR 1968 SC 1087. (1968) 3 SCR 158. *Byram Pestonji v. Union Bank of India*, (1992) 1 SCC 31. AIR 1991 SC 2234

passed by the court having no jurisdiction to pass it, it is a *nullity* and its validity can be set up even in the execution.<sup>52</sup> The underlying principle is that a defect of jurisdiction strikes at the very authority of the court to pass a decree and such a defect cannot be cured even by the consent of parties.<sup>53</sup>

Prior to the Amendment Act of 1976, a compromise decree could be passed only so far as it related to the suit. The Amendment Act, 1976 now specifically provided that whether or not the subject-matter of the agreement, compromise or satisfaction is identical with the subject-matter of the suit, if it is between the parties and the compromise is a lawful one, the court can pass such a decree.<sup>54</sup>

### (m) Bar to suit: Rule 3-A

No suit can be filed to set aside a compromise decree on the ground that it is not lawful.<sup>55</sup>

### (n) Appeal

No appeal lies against a decree passed by the court with consent of parties,<sup>56</sup> nor a suit can be instituted to set aside a compromise decree on the ground that such compromise is not lawful,<sup>57</sup> though such order was appealable before the Amendment Act, 1976.<sup>58</sup>

Rule 1-A(2) of Order 43, however, lays down that in an appeal against a decree passed after recording or refusing to record a compromise, the order recording or refusing to record a compromise can also be questioned. A party challenging the compromise can file an appeal under Section 96(1) of the Code and Section 96(3) shall not bar such an appeal.<sup>59</sup> Likewise, such a decree can be challenged by filing a suit on the ground of fraud, undue influence or coercion.<sup>60</sup>

52. *Ferozi Lal Jain v. Man Mal*, (1970) 3 SCC 181 AIR 1970 SC 794; *Roshan Lal v. Madan Lal*, (1975) 2 SCC 785; AIR 1975 SC 2130; *Nai Bahu v. Lala Ramnarayan*, (1978) 1 SCC 58 at pp. 61-62; AIR 1978 SC 22 at p. 25.

53. For detailed discussion, see *supra*, Chap. 1.

54. R. 3. See also *S.G. Thimmappa v. T. Anantha*, AIR 1986 Kant 1; *Union Carbide Corp'n v. Union of India*, (1991) 4 SCC 584 (671-72); AIR 1992 SC 248 AIR 1992 SC 317.

55. R. 3-A. See also *S.G. Thimmappa v. T. Anantha*, AIR 1986 Kant 1, *Banwari Lal v. Chando Devi*, (1993) 1 SCC 581, *Ruby Sales & Services (P) Ltd. v. State of Maharashtra*, (1994) 1 SCC 531.

56. S. 96(3). See also *infra*, Pt. III, Chap. 2.

57. R. 3-A.

58. Or. 43 R. 1(m) (since deleted).

59. *Banwari Lal v. Chando Devi*, (1993) 1 SCC 581; AIR 1993 SC 1139.

60. *Thimmappa v. Anantha*, AIR 1986 Kant 1; *Gosto Behari Pramanik v. Malati Sen*, AIR 1985 Cal 379; *Banwari Lal v. Chando Devi*, (1993) 1 SCC 581; *Ruby Sales & Services (P) Ltd. v. State of Maharashtra*, (1994) 1 SCC 531, see also *infra*, Pt. III, Chap. 2.

A compromise decree is a creature of an agreement and does not stand on a higher footing than the agreement which preceded it. It is, therefore, liable to be set aside on any of the grounds which may invalidate an agreement.<sup>61</sup>

#### (o) Revision

An order recording or refusing to record compromise is a "case decided" within the meaning of Section 115 of the Code. A High Court can revise such order provided the conditions laid down in the said section are satisfied.<sup>62</sup>

61 *Ruby Sales & Services (P) Ltd v State of Maharashtra*, (1994) 1 SCC 531 at p 535

62 For detailed discussion of "Revisional jurisdiction of High Courts", see *infra*, Pt III, Chap 9

# CHAPTER 13

## Death, Marriage and Insolvency of Parties

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### 1. GENERAL

Order 22 deals with the creation, assignment or devolution of interest during the pendency of suits. It also applies to appeals<sup>1</sup>, but not to execution proceedings.<sup>2</sup> The provisions of Order 22 are exhaustive.<sup>3</sup> They should, however, be liberally construed to serve the ends of justice.<sup>4</sup>

Such creation, assignment or devolution may arise in the following circumstances:

- (i) Death of a party (Rules 1 to 6, 10-A);
- (ii) Marriage of a party (Rule 7);
- (iii) Insolvency of a party (Rule 8); or
- (iv) Assignment of interest (Rule 10).

1. Or. 22 R 11.                      2. R 12.
3. *Bhagwan Swaroop v. Mool Chand*, (1983) 2 SCC 132; AIR 1983 SC 355; *Padmaram v. Surja*, AIR 1961 Raj 72; *Grindlays Bank Ltd. v. C.R.E., Workers' Co. (P) Ltd.*, AIR 1984 Del 138; *P. Preetha v. Panyam Cements & Mineral Industries Ltd.*, (2001) 6 Andh LT 779.
4. *Sardar Amarjit Singh v. Pramod Gupta*, (2003) 3 SCC 272. AIR 2003 SC 2588.

## 2. DEATH OF PARTY: RULES 1-6

Order 22, Rules 1-6, 9 and 10-A relate to death of a party, i.e. plaintiff or defendant and consequences of such death. Where a party to a suit dies, the first question which requires consideration is: whether right to sue survives? If the right does not survive, the matter is over. But if it survives, the suit will not abate.

Let us consider the effect of death of parties to suit.

### (a) Death of plaintiff

Where the sole plaintiff dies, the suit will not abate, if the right to sue survives. It can be continued by the heirs and legal representatives of the deceased plaintiff. If the right to sue does not survive, the suit will come to an end.<sup>5</sup>

Where one of the several plaintiffs dies and the right to sue survives to the surviving plaintiff or plaintiffs, the court will make an entry to that effect and proceed with the suit by the surviving plaintiff or plaintiffs.<sup>6</sup>

Where one of the several plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs or where the sole plaintiff dies and the right to sue survives, the court on an application by the legal representative of the deceased plaintiff will make him a party and proceed with the suit.<sup>7</sup>

Where no such application is made within the period of limitation (ninety days), the suit shall abate so far as the deceased plaintiff is concerned. On an application by the defendant, the court may award costs, which might have been incurred by him in defending the suit, from the estate of the deceased plaintiff.<sup>8</sup>

Where the plaintiff dies after hearing and before pronouncement of judgment, the suit shall not abate.<sup>9</sup>

The same principle will apply in case of death of the plaintiff after passing of preliminary decree and before final decree<sup>10</sup>

Once final decree is passed, the rights of the parties are adjudicated and the question is only of execution of the decree. The provisions relating to abatement do not apply to execution proceedings<sup>11</sup>; they, however, apply to appeals<sup>12</sup>

5 R 1. For detailed discussion, see *infra* 'Right to sue'

6 R 2 R 3(1) 8 R 3(2)

9 R 6 See also *N P Thiruganan v Dr R Jagan, Madras* (1995) 5 SCC 115 AIR 1996 SC 116

10 *Jitenendra Bhatia v Dhirendra Nath* AIR 2004 Ori 148

11 R 12 12 R 11

### (b) Death of defendant

Where the sole defendant dies, the suit shall not abate if the right to sue survives. It can be continued against the heirs and legal representatives of the deceased defendant.<sup>13</sup>

Where one of the several defendants dies and the right to sue survives against the surviving defendant or defendants, or where the sole surviving defendant dies and the right to sue survives, the court, on an application by the legal representatives of the deceased defendant, will make him a party and proceed with the suit.<sup>14</sup>

Where no such application is made within the period of limitation (ninety days), the suit shall abate as against the deceased defendant.<sup>15</sup>

The court may, if it thinks fit, exempt the plaintiff from substituting the legal representative of a non-contesting or *pro forma* defendant and pronounce judgment notwithstanding the death of such defendant.<sup>16</sup>

Where the plaintiff is ignorant of the death of the defendant and for that reason is unable to make an application for substitution of the legal representative of the deceased defendant within the period of limitation, and the suit stands abated, he may make an application for setting aside such abatement within the period of limitation (ninety days), stating that due to ignorance of the death of the defendant he could not make an application within time. The court shall consider the application, having due regard to the fact of such circumstance.<sup>17</sup>

Where the defendant dies after hearing and before the pronouncement of judgment, the suit shall not abate.<sup>18</sup> The suit also does not abate on account of the death of an unnecessary party.<sup>19</sup>

### (c) Right to sue

As already noted, when a party to a suit dies, the first question to be decided is whether the right to *sue* survives or not. If it does not, there is an end to the suit. If it does, the suit will not abate. It can be continued by or against the heirs and legal representatives of the deceased party.<sup>20</sup>

13 R. 1. For detailed discussion, see *infra*, "Right to sue".

14 R. 2.

15 R. 4(1).

16 R. 4(4).

17 R. 4(5).

18 R. 6.

19 *Radha Rani v. Hanuman Prasad*, AIR 1966 SC 216 (1966) 1 SCR 1; *Sri Chand v. Jagdish Pershad*, AIR 1966 SC 1427 (1966) 3 SCR 451, *Mangal Singh v. Rattno*, AIR 1967 SC 1786 (1967) 3 SCR 454; *Kanhayyalal v. Rameshwar*, (1983) 2 SCC 260; AIR 1983 SC 503, *Union of India v. Avtar Singh*, (1984) 3 SCC 589; AIR 1984 SC 1048.

20 R. 1. See also *Jayaram Reddy v. Revenue Divisional Officer*, (1979) 3 SCC 578 at p. 583; AIR 1979 SC 1393 at p. 1396, *Shri Krishna Singh v. Mathura Ahir*, (1981) 3 SCC 689 at p. 720; AIR 1980 SC 707.

The expression "right to sue" has not been defined in the Code, but it may be interpreted to mean "right to seek relief".<sup>21</sup> In other words, "right to sue" survives if the cause of action survives or continues.

The general rule is that all rights of action and all demands whatsoever, existing in favour of or against a person at the time of his death, survive to or against his representatives.<sup>22</sup> But in cases of personal actions, i.e. actions where the relief sought is personal to the deceased or the rights intimately connected with the individuality of the deceased, the right to sue will not survive to or against his representatives. In these cases, the maxim *actio personalis moritur cum persona* (a personal action dies with the person) applies.<sup>23</sup>

This principle is found in Section 37 of the Indian Contract Act, 1872<sup>24</sup> and Section 306 of the Indian Succession Act, 1925.<sup>25</sup>

21. *Ibrahimhai v. State of Gujarat*, AIR 1968 Guj 202 at p. 207: (1967) 8 Guj LR 793 at p. 801; *Phool Rani v. Naubat Rai Ahluwalia*, (1973) 1 SCC 688 at p. 692.

22. *Shri Krishna Singh v. Mathura Ahir*, (1981) 3 SCC 689 at p. 720: AIR 1980 SC 707 at p. 726; *Ambalika Padhi v. Radhakrishna Padhi*, (1992) 1 SCC 667: AIR 1992 SC 431; *M. Veerappa v. Evelyn Sequeira*, (1988) 1 SCC 556: AIR 1988 SC 506.

23. *Giryanandini Devi v. Bijendra Narain*, AIR 1967 SC 1124: (1967) 1 SCR 93, *Hazari v. Neki*, AIR 1968 SC 1205: (1968) 2 SCR 833; *Phool Rani case*, (1973) 1 SCC 688 at p. 692: AIR 1973 SC 2110 at p. 2111; *Melepurath Sankunni v. Thekittil Geopalankutty*, (1986) 1 SCC 118: AIR 1986 SC 411; *M. Veerappa v. Evelyn Sequeira*, (1988) 1 SCC 556: AIR 1988 SC 506; *Puran Singh v. State of Punjab*, (1996) 2 SCC 205: AIR 1996 SC 1092; *Koodalmanickam v. Thachudaya Kaimal*, (1996) 2 SCC 680.

24. S. 37, Contract Act, 1872 reads as under:

"Obligation of parties to contracts —The parties to a contract must either perform, or offer to perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of death of such promisors before performance, unless a contrary intention appears from the contract.

#### Illustrations

(a) A promises to deliver goods to B on certain day on payment of Rs 1000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay Rs 1000 to A's representatives

(b) A promises to paint a picture for B by a certain day, at a certain price. A dies before that day. The contract cannot be enforced either by A's representatives or by B."

25. S. 306, the Succession Act, 1925 reads:

"Demands and rights of action of or against deceased survive to and against executor or administrator — All demands whatsoever and all rights to prosecute or defend any action or special proceedings existing in favour of or against a person at the time of his decease, survive to and against his executors and administrators, except causes of action for defamation, assault, as defined in the Indian Penal Code, or other personal injuries not causing the death of the party, and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory.

#### Illustrations

(a) A collision takes place on a railway station in consequence of some neglect or default of an official, and a passenger is severely hurt but not so as to cause death. He afterwards dies without having brought any action. The cause of action does not survive

Thus, it has been held that the right to sue survives in a suit by a landlord against his tenant for the possession of the rented house after the death of the landlord; or in a suit for rendition of accounts against a trustee where the trustee died; or in a suit for specific performance of the contract after the death of the plaintiff; or in a suit for partition of ancestral property by a coparcener after his death; or in a suit for pre-emption. On the other hand, it has been held that the right to sue does not survive in the following cases: in a suit for damages for assault, personal injuries or for malicious prosecution; or for defamation; or for breach of contract of betrothal; or for dissolution of marriage; or in a suit for specific performance of a contract involving exercise of special skill like a promise to paint a picture, or to sing a song.

#### (d) Nature of inquiry

A personal action dies with the death of the person (*actio personalis moritur cum persona*). This doctrine, however, operates in a limited class of actions *ex delicto*, discussed above. In other actions, where the right to sue survives in spite of the death of the person, the suit does not abate. Hence, whenever a party to a suit dies, the first question to be decided is as to whether the right to sue survives or not. If the right is held to be a personal right which extinguishes with the death of the person concerned and does not devolve on the legal representatives, there is an end to the suit. But if the right to sue survives against the legal representatives of the plaintiff, the suit can continue.<sup>26</sup>

In *M. Veerappa v. Evelyn Sequeira*<sup>27</sup>, the Supreme Court rightly stated:

"If the entire suit claim is founded on torts the suit would undoubtedly abate. If the action is founded partly on torts and partly on contract then such part of the claim as relates to torts would stand abated and the other part would survive. If the suit claim is founded entirely on contract then the suit has to proceed to trial in its entirety and be adjudicated upon."<sup>28</sup>

In *Melepurath Sankunni v. Thekittil Geopalankutty*<sup>29</sup>, the Supreme Court held that where a suit for defamation is dismissed and the plaintiff files an appeal, the plaintiff-appellant seeks to enforce his right to sue for damages against the defendant. The right to sue, therefore, does not survive on the death of the plaintiff. But where such suit is decreed,

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(b) A sues B for divorce. A dies. The cause of action does not survive to his representative." See also *Melepurath v. Thekittil*, (1986) 1 SCC 118: AIR 1986 SC 411.

26. *Puran Singh v. State of Punjab*, (1996) 2 SCC 205 at p. 210. AIR 1996 SC 1092

27. (1988) 1 SCC 556: AIR 1988 SC 506.

28. *Ibid*, at p. 568 (SCC): at p. 512 (AIR).

29. (1986) 1 SCC 118. AIR 1986 SC 411, see also *Yallawva v. Shantavva*, (1997) 11 SCC 159. AIR 1997 SC 35.

even on the death of the plaintiff, the legal representatives are entitled to continue the appeal since the question relates to benefit or detriment to the estate of the deceased. In such case, the cause of action merges with the decree.

### (e) Applicability to other proceedings: Rules 11-12

The maxim *actio personalis moritur cum persona* (a personal action dies with the person) does not apply only to suits in those cases where the plaintiff dies during the pendency of a suit but also to cases where the plaintiff dies during the pendency of appeal or appeals. *This is on the footing that by reason of the dismissal of the suit by the trial court or the first appellate court, as the case may be, the plaintiff stands relegated to his original position before the trial court.*<sup>30</sup> (emphasis supplied)

This principle is, however, subject to the rule laid down in *Melepurath Sankunni v. Thekittil Geopalankutty*<sup>31</sup>.

The provisions of Order 22 of the Code in terms do not apply to execution proceedings,<sup>32</sup> to writ petitions under Article 226 or 32 of the Constitution,<sup>33</sup> or to revisions.<sup>34</sup>

A representative suit or appeal does not abate on the death of one of the plaintiffs or appellants. The remaining plaintiff/plaintiffs or appellant/appellants may continue the proceedings.<sup>35</sup>

### (f) Partial abatement

An abatement of suit may be total or partial. If the entire suit is founded on tort or on personal action, the suit would debate as a whole on the death of the plaintiff or the defendant, as the case may be. But if the action is founded partly on tort and partly on contract, the claim relating to tort will abate whereas the claim relating to contract will survive.<sup>36</sup>

Thus, if A files a suit against B, a trustee under Section 92 of the Code for his removal as also for settlement of scheme and B dies during the

30. *M. Veerappa v. Evelyn Sequeira*, (1988) 1 SCC 556. AIR 1988 SC 506

31. (1986) 1 SCC 118. AIR 1986 SC 411

32. Or. 22 R. 12, see also *Gnanthesher v. Madan Mohan*, (1996) 11 SCC 446. AIR 1997 SC 471.

33. *Puran Singh v. State of Punjab*, (1996) 2 SCC 205. AIR 1996 SC 1002

34. *Swastik Oil Mills Ltd. v. CIT*, AIR 1968 SC 843. (1968) 2 SCR 492. *Mohd. Sadaat Ali v. Corpn. of City of Lahore*, AIR 1949 Lah 186 (FB). *Narpatsingh v. Gokuldas*, AIR 1966 AP 384.

35. *Charan Singh v. Darshan Singh*, (1975) 1 SCC 298. AIR 1975 SC 371. *Gujarat SRTC v. Vallu Mulu Series*, (1979) 3 SCC 202. AIR 1980 SC 64.

36. *M. Veerappa v. Evelyn Sequeira*, (1988) 1 SCC 556. AIR 1988 SC 506

pendency of suit; the suit will abate as regards his removal, but it can be continued as regards settlement of scheme.<sup>37</sup>

### (g) Determination of question as to legal representative

Rule 5 deals with the determination of the question as to legal representatives. It provides that where the question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, it is the duty of the court to decide such question. Wherever there is a dispute as to who is the legal representative of the deceased plaintiff or the deceased defendant, the court may hold an inquiry and determine the question. A lengthy or elaborate inquiry is, however, not necessary. Where such question arises before the appellate court, that court may direct the subordinate court to inquire into and give its findings on the dispute as to who is the legal representative of a deceased party.<sup>38</sup>

### (h) Duty of pleader: Rule 10-A

Rule 10-A as inserted by the Amendment Act of 1976 imposes an obligation on the pleader of the parties to communicate to the court the fact of the death of the party represented by him.<sup>39</sup>

As a general rule, on the death of the client, his contract with the pleader comes to an end and so the authority of the pleader to act on behalf of his client expires. Such a situation, however, creates many complications. A provision is, therefore, made which imposes a duty on the part of the pleader to inform the court of the death of his client. It also enacts that for the said purpose the contract between the pleader and the party shall be deemed to subsist.<sup>40</sup>

The legislative intention of casting burden on the advocate of a party to give intimation of death of the party represented by him and for this limited purpose to introduce a deeming fiction of the contract being kept subsisting between the advocate and the deceased party through his legal representative/representatives was that the other party may not be taken unaware at the time of hearing of appeal.<sup>41</sup> As observed in *Gangadhar v. Raj Kumar*<sup>42</sup>, this rule has been introduced "in order to avoid procedural justice scoring a march over substantial justice".

37. *Anand Rao v. Ramdas*, (1920-21) 48 IA 12: AIR 1921 PC 123.

38. Proviso to R. 5.

39. *O.P. Kathpalia v. Lakhmur Singh*, (1984) 4 SCC 66 at p. 82: AIR 1984 SC 1744 at p. 1755; *Gangadhar v. Raj Kumar*, (1984) 1 SCC 121 at p. 125. AIR 1983 SC 1202 at p. 1205.

40. Statement of Objects and Reasons

41. *Gangadhar v. Raj Kumar*, (1984) 1 SCC 121. See also *Bhagwan Swaroop v. Mool Chand*, (1983) 2 SCC 132: AIR 1983 SC 355.

42. (1984) 1 SCC 121 at p. 125: AIR 1983 SC 1202 at p. 1205

### (i) Duty of court: Rule 10-A

Rule 10-A also casts duty on the court to give notice of death of one party to the other party. The duty is statutory and must be observed which is clear from the words "*the Court shall thereupon give notice of such death to the other party.*"

### (j) Procedure where there is no legal representative

Rule 4-A has been added by the Amendment Act of 1976. It lays down the procedure where there is no legal representative of a party who has died during the pendency of the suit or a legal representative is not found. The underlying object of this provision is that the other side should not suffer because of the absence of the legal representative of the deceased party.

### (k) Effect of abatement: Rule 9

Where the suit abates or is dismissed due to failure of the plaintiff to bring the legal representative or representatives of the deceased party, no fresh suit will lie on the same cause of action. The only remedy available to the plaintiff or the person claiming to be the legal representative is to get the abatement set aside.<sup>43</sup>

Such abatement or dismissal of the suit, however, does not operate as *res judicata*.<sup>44</sup>

### (l) Suit against dead person

No suit can be filed against a dead person. Such a suit is *non est* and has no legal effect. Likewise, a decree passed against a dead man is a nullity.<sup>45</sup>

But where a suit is filed against a dead person by the plaintiff without knowledge of such death, on the application by the plaintiff, the court may permit the legal representatives of the defendant to be brought on record. On such impleadment, the suit shall be deemed to have been instituted on the day the plaint was presented. *The court's satisfaction breathes life into the suit.*<sup>46</sup> (emphasis supplied)

43 R 9

44 *Ibid* see also *supra* 'Res judicata' Chap. 2

45 *Hira Lal v. Kuli Nath* AIR 1962 SC 109 at p. 201 (1961) 2 SCR 747; see also *Amba Bai v. Gopal* (2001) 5 SCC 570 AIR 2001 SC 2007

46 *Karappaswamy v. C. Ramamurthy*, (1993) 4 SCC 41 at p. 45 AIR 1993 SC 2324 at p. 2326

**(m) Consequences**

On the death of a party to the suit, the following consequences ensue:

<p>1. (a) Where one of the several plaintiffs dies and the right to sue survives in favour of the surviving plaintiff or plaintiffs alone; or</p> <p>(b) where one of the several defendants dies and the right to sue survives against the surviving defendant or defendants alone,</p>	<p>— the Court shall record such fact and proceed with the suit.<sup>a</sup></p>
<p>2. (a) Where one of the several plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or</p> <p>(b) where a sole surviving plaintiff dies and the right to sue survives,</p>	<p>— on an application being made, the court shall make the legal representatives of the deceased plaintiff a party and proceed with the suit.<sup>b</sup></p> <p>If no such application is made within the prescribed period, the suit shall abate so far as the deceased plaintiff is concerned.<sup>c</sup></p> <p>In such case, on an application by the defendant, the court may award to him the costs which he may have incurred in defending the suit from the estate of the deceased plaintiff.<sup>d</sup></p>
<p>3. (a) Where one of the several defendants dies and the right to sue does not survive against surviving defendant or defendants alone; or</p> <p>(b) where a sole surviving defendant dies and the right to sue survives,</p>	<p>— on an application being made, the court shall make the legal representatives of the deceased defendant a party and proceed with the suit.<sup>e</sup></p> <p>If no such application is made within the prescribed period, the suit shall abate against the deceased defendant.<sup>f</sup></p> <p>The court may, however, at its discretion exempt a plaintiff from substituting the legal representatives of a non-contesting or <i>pro forma</i> defendant and pronounce the judgment notwithstanding the death of such defendant.<sup>g</sup></p> <p>Where the plaintiff was ignorant of the death of a defendant and could not, for that reason, make an application for the substitution of legal representative of such defendant within the prescribed period, and the suit is abated, he (plaintiff) may make an application for such abatement within the prescribed period, and in considering the said application, the court shall have due regard to the fact of such ignorance of the plaintiff.<sup>h</sup></p>
<p>4 Where either party dies between the conclusion of the hearing and the pronouncement of the judgment,</p>	<p>— suit shall not abate whether the cause of action survives or not.<sup>i</sup></p>

<sup>a</sup> R 2<sup>f</sup> R 4(3).<sup>b</sup> R 3(1).<sup>g</sup> R 4(4)<sup>c</sup> R 3(2)<sup>h</sup> R 4(5)<sup>d</sup> R 3(2).<sup>i</sup> R 6<sup>e</sup> R 4(1)

## (n) General principles

With regard to the death of a party to a proceeding, from the various judgments of the Supreme Court, the following general principles emerge:

- (1) If an application is not made within the time allowed by law to bring the legal representatives of the deceased on record, the suit will abate so far as the deceased plaintiff or the deceased defendant is concerned.<sup>47</sup> Such abatement is automatic and no specific order is envisaged by the Code.<sup>48</sup>
- (2) When once a suit or appeal is abated, a specific order setting aside such abatement is necessary.<sup>49</sup>
- (3) Where in a proceeding, a party dies and one of the legal representatives is already on record in another capacity, what is necessary is that he should be described also as an heir and legal representative of the deceased party. Failure to describe him as such would not, however, abate the proceeding.<sup>50</sup>
- (4) If there are two or more heirs and legal representatives of the deceased party and one or more have been brought on record within time, a suit or an appeal will not abate on the ground that all the legal representatives have not been brought on record in time.<sup>51</sup>
- (5) If the legal representatives of the deceased plaintiff or the deceased defendant are brought on record within the prescribed period at one stage of the suit, it will enure for the benefit of the subsequent stages of the suit.<sup>52</sup>
- (6) Where a plaintiff or an appellant after diligent and *bona fide* inquiry ascertains who the legal representatives of a deceased defendant or respondent are, and brings them on record within

47. *Union of India v. Ram Charan*, AIR 1964 SC 215 (1964) 3 SCR 467; *Jayaram Reddy v Revenue Divisional Officer*, (1979) 3 SCC 578. AIR 1979 SC 1393, *Zilla Singh v Chandgi*, 1991 Supp (2) SCC 430. AIR 1991 SC 263, *Chaudhry Ram v. State of Harvana*, 1994 Supp (3) SCC 675.

48. *Madan Naik v Hansubala Devi*, (1983) 3 SCC 15 at pp 18-19. AIR 1983 SC 676 at p 679, *Jayaram Reddy v Revenue Divisional Officer* (1979) 3 SCC 578.

49. *Ibid*, see also R 9.

50. *Manabir Prasad v Jagu Ram*, (1971) 1 SCC 265. AIR 1971 SC 742, *Jayaram Reddy v Revenue Divisional Officer*, (1979) 3 SCC 578. AIR 1979 SC 1393, *Mohd Arif v Allah Rabbul*, (1982) 2 SCC 455. AIR 1982 SC 948.

51. *Manabir Prasad v Jagu Ram*, (1971) 1 SCC 265, *Ramdass v Director of Consolidation* (1971) 1 SCC 460. AIR 1971 SC 673, *Jayaram Reddy v Revenue Divisional Officer* (1979) 3 SCC 578. AIR 1979 SC 1393, *BANCO National Ultramarino v Nahm Bai Nauque*, 1989 Supp (2) SCC 275. AIR 1989 SC 1589.

52. *Rangubai K. M. Sankar v Sunderabai Bhatar*, AIR 1965 SC 1794 (1965) 3 SCR 211, *Jayaram Reddy v Revenue Divisional Officer* (1979) 3 SCC 578. AIR 1979 SC 1393.

the prescribed period, there is no abatement of the suit or appeal if the impleaded legal representatives sufficiently represent the estate of the deceased. The decree passed by the court in such a case will bind not only those impleaded but the entire estate too.<sup>53</sup>

- (7) The above rule, however, does not apply where the impleading of a person as a legal representative is not found to be *bona fide* or where there has been fraud or collusion between the creditor and the heir impleaded or there are other circumstances which indicate that there has not been a fair or real trial.<sup>54</sup>
- (8) The doctrine of abatement applies to an appeal also.<sup>55</sup>
- (9) No suit can be filed against a dead person. But if a suit is filed against a dead man without the knowledge that he is dead, it is not *non est*. On an application by the plaintiff, the court may permit to implead the right defendant in the place of the deceased defendant.<sup>56</sup> *The court's satisfaction breathes life into the suit.*<sup>57</sup>

(emphasis supplied)

- (10) Legal representatives of the deceased are entitled to take all the contentions available to the deceased. But if they intend to take personal or individual defences, they must get themselves impleaded in their personal capacity.<sup>58</sup>
- (11) On the death of the plaintiff/appellant, whether or not the suit/appeal abates depends upon whether the suit/appeal is founded entirely on torts or on contract, or partly on torts and partly on contract.<sup>59</sup>

53. *Harihar Prasad v. Balmiki Prasad*, (1975) 1 SCC 212; AIR 1975 SC 733; *Jayaram Reddy v. Revenue Divisional Officer*, (1979) 3 SCC 578; AIR 1979 SC 1393; *Daya Ram v. Shyam Sundari*, AIR 1965 SC 1049; (1965) 1 SCR 231; *N K Mohd. Sulaiman v. N.C. Mohd Ismail*, AIR 1966 SC 792; (1966, 1 SCR 937; *Dolai Maliko v. Krushna Chandra*, AIR 1967 SC 49; 1966 Supp SCR 22; *Collector of 24 Parganas v. Lalith Mohan*, 1988 Supp SCC 578; AIR 1988 SC 2121; *BANCO National Ultramarino v. Nalini Bai Naique*, 1989 Supp (2) SCC 275; *Raj Rajeshwari Prasad v. Shashi Bhushan*, (1995) 5 SCC 579.

54. *Ibid*

55. R. 11. See also *Ramagya Prasad v. Murli Prasad*, (1973) 2 SCC 9; AIR 1972 SC 1181; *Jayaram Reddy v. Revenue Divisional Officer*, (1979) 3 SCC 578, at p. 589 (SCC); AIR 1979 SC 1393 at p. 1401 (AIR); *Madan Naik v. Hansubala Devi*, (1983) 3 SCC 15; AIR 1983 SC 676; *Bhagwan Sawaroop v. Mool Chand*, (1983) 2 SCC 132; AIR 1983 SC 355; *M Veerappa v. Evelyn Sequeira*, (1988) 1 SCC 556; AIR 1988 SC 506.

56. *Ramprasad v. Vijaykumar*, AIR 1967 SC 278; 1966 Supp SCR 188; *Cuttack Municipality v. Shyamsundar Behera*, AIR 1977 Ori 137; *Sisir Kumar v. Manindra Kumar*, AIR 1958 Cal 681; *C. Mutu v. Bharathi Match Works*, AIR 1964 Mys 293.

57. *Karuppaswamy v. C. Ramamurthy*, (1993) 4 SCC 41 at p. 45; AIR 1993 SC 2324 at p. 2326.

58. *Bal Kishan v. Om Parkash*, (1986) 4 SCC 155; AIR 1986 SC 1952; *Vidyawati v. Man Mohan*, (1995) 5 SCC 431; AIR 1995 SC 1653.

59. *M Veerappa v. Evelyn Sequeira*, (1988) 1 SCC 556; AIR 1988 SC 506; *Kanta Ram v. Rama Rani*, (1988) 2 SCC 109; AIR 1988 SC 726; *Collector of 24 Parganas v. Lalith Mohan*, 1988 Supp SCC 578; AIR 1988 SC 2121.

- (12) No decree can be passed in favour of or against a dead person. But such a decree is not *necessarily* a nullity. In certain circumstances, it is permissible for the court to reopen the proceedings or to remand the case and to decide the case after hearing the parties likely to be affected thereby.<sup>60</sup>
- (13) Where a joint and indivisible decree is passed by the court below in favour of two or more plaintiffs and one of them dies and the defendant fails to bring the heirs and legal representatives of the deceased plaintiff on record in time, the appeal against the other respondents also abates.<sup>61</sup>
- (14) In cross-appeals arising from the same decree where parties to a suit adopt rival positions, on the death of a party if his legal representatives are impleaded in one appeal it will not enure for the benefit of cross-appeal and the same would abate.<sup>62</sup>
- (15) If an appeal as well as cross-objections in the appeal are before the court and the respondent dies, substitution of his legal representatives in the cross-objections, being part of the same record, would enure for the benefit of the appeal and the failure of the appellant to implead the legal representatives of the deceased respondent would not have the effect of abating the appeal but not *vice versa*.
- (16) A suit filed in a representative capacity does not abate on the death of one of the plaintiffs<sup>63</sup> nor a suit filed by a *karta* of a Hindu undivided family abates on his death and the succeeding *karta* can continue the proceedings.<sup>64</sup>
- (17) A suit or appeal does not abate on account of the death of an unnecessary, non-material or *pro forma* defendant or respondent<sup>65</sup>

60. *Melepurath Sankunni v. Thekittil Geopalankutty*, (1986) 1 SCC 118. AIR 1986 SC 411, *M. Veerappa v. Evelyn Sequeira*, (1988) 1 SCC 556; AIR 1988 SC 506, *Hira Lal v. Kali Nath*, AIR 1962 SC 199 at p. 201; (1962) 2 SCR 747; *Jayaram Reddy v. Revenue Divisional Officer*, (1979) 3 SCC 578 at p. 583 (SCC); AIR 1979 SC 1393 at p. 1396, *Jiviben Laxiji Raganath v. Jadaoji Devshanker*, AIR 1978 Guj 32; (1977) 18 Guj LR 883, *Premptari v. Dukhi*, AIR 1976 All 444, *Radhakrishna v. Chatursingh*, AIR 1987 Guj 220, *Himangshu Bhusan v. Manindra Mohan*, AIR 1954 Cal 205, *Raddulal v. Mahabirprasad*, AIR 1959 Bom 384; *Abdul Azeez v. Dhanabagiammal*, AIR 1983 Mad 5, *Karuppaswamy v. C. Ramamurthy*, (1993) 4 SCC 41; AIR 1993 SC 2324, *Kishun v. Behari*, (2005) 6 SCC 300.

61. *State of Punjab v. Nathu Ram*, (1975) 1 SCC 212, *Harihar Prasad v. Balmiki Prasad*, (1975) 1 SCC 212, *Bibijan v. Murlidhar*, (1995) 1 SCC 187, *Papanna v. State of Karnataka*, (1996) 1 SCC 291.

62. *Jayaram Reddy case*, (1979) 3 SCC 578 at p. 595. AIR 1979 SC 1393 at p. 1406, *Chaudhry Ram v. State of Haryana*, 1994 Supp (3) SCC 675.

63. *Charan Singh v. Darshan Singh*, (1975) 1 SCC 298. AIR 1975 SC 371.

64. *Gujarat SRTC v. Valji Mulji*, (1979) 3 SCC 202. AIR 1980 SC 64.

65. *Mangal Singh v. Rattno*, AIR 1967 SC 1786 (1967) 3 SCR 454, *Kanhayyalal v. Rameshwar*, (1983) 2 SCC 260. AIR 1983 SC 503, *Union of India v. Atar Singh*, (1984) 3 SCC 589. AIR 1984 SC 1048, *Upper India Cable Co. v. Bal Kishan*, (1984) 3 SCC 462. AIR 1984 SC 1381.

- (18) Neither a suit nor an appeal abates where any party to a suit or an appeal dies between the conclusion of hearing and the pronouncement of the judgment.<sup>66</sup>
- (19) The court has no inherent power under Section 151 of the Code to implead legal representatives of a deceased respondent if the suit had abated on account of the appellant not taking appropriate steps within time to bring the legal representatives of the deceased party on record.<sup>67</sup>
- (20) When a suit or appeal abates, a very valuable right accrues to the other party and such a right cannot be ignored or interfered with lightly. In the name of doing substantial justice to one party, no injustice should be done to the other party.<sup>68</sup>
- (21) Laches or negligence furnish no good grounds for setting aside abatement. A party guilty of negligence must bear the consequences and must suffer.<sup>69</sup> However, if there is a slight negligence or minor laches which is not intentional in not making an application within time, an application for setting aside abatement can be granted for doing substantial justice.<sup>70</sup> The rural background of the parties can also be taken into account for this purpose.<sup>71</sup>
- (22) If the parties proceed with the matter without raising any objection regarding abatement of suit or appeal, no objection can be allowed at a later stage.<sup>72</sup>
- (23) A mere excuse about the plaintiff not knowing of the death of the opposite party is not sufficient. He has to state reasons, which, according to him, led to his not knowing of the death of the defendant within a reasonable time and satisfy the court about it.<sup>73</sup>

66. R 6. See also *N P. Thirugnanam v Dr. R Jagan Mohan*, (1995) 5 SCC 115; *Shri Krishna Singh v Mathura Ahir*, (1981) 3 SCC 689 at p. 720; AIR 1980 SC 707 at pp. 726-27, *Shiv Dass v. Devki*, 1995 Supp (2) SCC 658, *Union of India v. Avtar Singh*, (1984) 3 SCC 589; AIR 1984 SC 1048.

67. *Union of India v. Ram Charan*, AIR 1964 SC 215. (1964) 3 SCR 467.

68. *Bhagwan Swaroop v. Mool Chand*, (1983) 2 SCC 132 at p. 139. AIR 1983 SC 355 at p. 358; *State of Gujarat v. Sayed Mohd. Baquir*, (1981) 4 SCC 1; AIR 1981 SC 1921; *Newanness v. Sk Mohamad*, 1995 Supp (2) SCC 529.

69. *Bhagwan Swaroop v. Mool Chand*, (1983) 2 SCC 132 at p. 140; AIR 1983 SC 355 at p. 359.

70. *Ibid*, *Shadi v. Ram Pal*, (1983) 2 SCC 255; *Bapurao v. Jamunabai*, (1983) 2 SCC 253; AIR 1983 SC 186; *Harjeet Singh v. Raj Kishore*, (1984) 3 SCC 573; AIR 1984 SC 1238, *Gangadhar v. Raj Kumar*, (1984) 1 SCC 121 at pp. 124-25; AIR 1983 SC 1202 at pp. 1204-05; *O.P. Kathpalia v. Lakhmur Singh*, (1984) 4 SCC 66 at p. 62. AIR 1984 SC 1744 at p. 1755.

71. *Sital Prasad v. Union of India*, (1985) 1 SCC 163; AIR 1985 SC 1; *Ram Sumiran v. DDC*, (1985) 1 SCC 431; AIR 1985 SC 606, *Bhag Singh v. Daljit Singh*, 1987 Supp SCC 685.

72. *Chaya v. Bapusaheb*, (1994) 2 SCC 41; *Dondapani Sahu v. Arjuna Panda*, (1969) 3 SCC 397; *Shiv Dass v. Devki*, 1995 Supp (2) SCC 658.

73. *Union of India v. Ram Charan*, AIR 1964 SC 215; (1964) 3 SCR 467.

- (24) Where a suit abates or is dismissed for the non-substitution of the legal representative or representatives of the deceased party, no fresh suit can be filed on the same cause of action.<sup>74</sup> However, the cause of action of the abated suit may be invoked as a defence in a subsequent suit.<sup>75</sup>
- (25) Where a suit abates or is dismissed under Order 22, the plaintiff or his legal representative/representatives may apply for an order to set aside the abatement or dismissal, and if it is proved that the applicant was prevented by any sufficient cause from continuing the suit, the court will set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.<sup>76</sup>
- (26) The expression "sufficient cause" should be construed liberally to advance substantial justice.<sup>77</sup> A strict and pedantic approach should not be taken by the Court.<sup>78</sup>
- (27) Though "sufficient cause" cannot be construed liberally merely because the defaulting party is the Government,<sup>79</sup> yet delay in official business requires a public justice approach.<sup>80</sup> Certain amount of latitude within reasonable limits is permissible having regard to impersonal bureaucratic set-up involving red-tapism.<sup>81</sup>
- (28) Considerations for condonation of delay under Section 5 of the Limitation Act and for bringing heirs on record or for setting aside abatement under Order 22 are distinct and different.<sup>82</sup>
- (29) Where no sufficient cause for condonation of delay for setting aside an abatement is made out by the applicant, the suit or appeal requires to be dismissed. A strong case on merits is not a ground for condonation of delay.<sup>83</sup>
- (30) An order refusing to set aside an abatement is not a "decree" within the meaning of Section 2(2). The order, however, has been made appealable.<sup>84</sup> But neither Second Appeal nor Letters Patent Appeal is maintainable against such an order.<sup>85</sup>

74. R. 9(1).

75. Expln. to R. 9.

76. R. 9(2). See also *Bhagwan Swaroop v. Mool Chand*, (1983) 2 SCC 132.77. *Union of India v. Ram Charan*, AIR 1964 SC 215, *Bhagwan Swaroop v. Mool Chand* (1983) 2 SCC 132.78. *Ibid*, see also *Bhag Singh v. Daljit Singh*, 1987 Supp SCC 685, *Sital Prasad v. Union of India*, (1985) 1 SCC 163, AIR 1985 SC 1.79. *State of Gujarat v. Sayed Mohd. Baquir*, (1981) 4 SCC 1, AIR 1981 SC 1921, *Bhagwan Swaroop v. Mool Chand* (1983) 2 SCC 132, AIR 1983 SC 355.80. *State of M.P. v. S.S. Akolkar*, (1996) 2 SCC 568, AIR 1996 SC 1984.81. *State of Haryana v. Chandra Mann*, (1996) 3 SCC 132, AIR 1996 SC 1623, *Municipal Corpn. of Ahmedabad v. Manish Enterprises Ltd.*, (1992) 2 Guj LR 1252, (1992) 2 Guj LH 176.82. *Ram Bhajan Singh v. Madheshwar Singh*, 1995 Supp (2) SCC 757, AIR 1995 SC 1685.83. *State of Gujarat v. Sayed Mohd. Baquir* (1981) 4 SCC 1, AIR 1981 SC 1921, *Bhagwan Swaroop v. Mool Chand* (1983) 2 SCC 132, AIR 1983 SC 355.

84. Or. 43 R. 11(k).

85. *Manjan Nani v. Hansubala Devi*, (1983) 3 SCC 15, AIR 1983 SC 676.

### 3. MARRIAGE OF PARTY: RULE 7

The marriage of a female plaintiff or defendant shall not cause the suit to abate. Where the decree is passed against a female defendant, it may be executed against her alone.<sup>86</sup> A decree in favour of or against a wife, where the husband is legally entitled to the subject-matter of the decree or is liable for the debt of his wife may, with the permission of the court, be executed by or against him.<sup>87</sup>

### 4. INSOLVENCY OF PARTY: RULE 8

#### (a) Insolvency of plaintiff

The insolvency of a plaintiff shall not cause the suit to abate and can be continued by his Assignee or Receiver for the benefit of his creditors. But if the Assignee or Receiver declines to continue the suit, or to give security for costs, as ordered by the court, the court may, on the application of the defendant, dismiss the suit on the ground of the plaintiff's insolvency. The court may also award the defendant costs for defending the suit, to be paid as a debt against the plaintiff's estate.<sup>88</sup>

#### (b) Insolvency of defendant

Rule 8 does not apply where the defendant becomes an insolvent. In such cases, the court may stay the suit or proceeding pending against the defendant who has been adjudged an insolvent.<sup>89</sup> Rule 10 will also apply in those cases and a receiver will become a representative of the defendant-debtor.

### 5. DEVOLUTION OF INTEREST: RULE 10

Rule 10 enacts that if, during the pending of the suit, any interest in the suit has passed from the plaintiff or defendant to any other person, the suit may with the leave of the court be continued by or against the person in whose favour such interest is created.

Rule 10 is based on a principle that the trial of a suit cannot be brought to an end merely because the interest of a party in the subject-matter of the suit has devolved upon another during the pendency of the suit, but the suit may be continued against the person acquiring interest with the leave of the court.<sup>90</sup>

86 R 7(1).

87 R. 7(2).

88. R 8.

89. *Kala Chand Banerjee v. Jagannath Marwari*, (1926-27) 54 IA 190; AIR 1927 PC 108.

90. *Rikhu Dev v. Som Dass*, (1976) 1 SCC 103 at p 106. AIR 1975 SC 2159 at p. 2160, *Ghafoor Ahmad v. Bashir Ahmad*, (1982) 3 SCC 486 AIR 1983 SC 123, *Pavitri Devi v. Darbari Singh*, (1993) 4 SCC 392, *Karuppaswamy v. C Ramamurthy*, (1993) 4 SCC 41. AIR 1993 SC 2324.

## CHAPTER 14

### Trial

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#### 1. GENERAL

After the plaint has been presented by the plaintiff and the written statement by the defendant in court and the issues have been framed by the court, a stage is reached when the parties to the suit are in a position to know what facts and what documents should be proved by them. For this purpose, any party to the suit may apply to the court for summons to persons whom he proposes to call as his witnesses

Sections 30 to 32 and Orders 16 to 18 contain necessary provisions for summoning, attendance and examination of witnesses. Order 16 provides for summoning and attendance of witnesses. Order 16-A makes special provisions for attendance of witnesses confined or detained in prisons. Order 17 deals with adjournments whereas Order 18 makes provisions for hearing of suits and examination of witnesses.

## 2. SUMMONING AND ATTENDANCE OF WITNESSES: ORDER 16

### (a) Summons to witnesses: Rule 1

Sub-rule (1) of Rule 1 requires the parties to the suit to submit in court a list of witnesses whom they propose to call either to give evidence or to produce documents and to obtain summonses for their attendance in court. Such list must be filed on or before such date as the court may appoint but not later than fifteen days after the issues are framed.

The object underlying this provision is to give notice to a party about the witnesses which his adversary is to examine in the case so that he could be in a position to know the nature of evidence he has to meet. The legislature has not put total prohibition on a party to produce witnesses for proof of his case. But when he seeks the assistance of the court, he has to give reasons why he has not filed an application within the prescribed time limit.<sup>1</sup> Sub-rule (3) of Rule 1 empowers the court to permit a party to call any witness whose name has not been mentioned in the list filed under sub-rule (1), if such party shows sufficient cause for the omission to mention the name of such witness in the said list.

Ordinarily, it is for the parties to move the court to issue summonses to witnesses. Rule 1-A enables a party to bring any witness to give evidence or to produce documents without applying for summons. Rules 1 and 1-A operate in two different areas and cover two different situations. Where a party wants the assistance of the court to ensure presence of a witness on being summoned through the court, it is obligatory for him to follow the procedure laid down in Rule 1. But where he wants to produce his witnesses without the assistance of the court, he can do so under Rule 1-A and the court has no jurisdiction to decline to examine such witnesses.<sup>2</sup>

The court has also power to summon any person as a witness if it thinks that the ends of justice so require or that the case before it needs

1. Sub-rules (2), (3) of R. 1, see also *Lalitha J. Rai v. Aithappa Rai*, (1995) 4 SCC 244 AIR 1995 SC 1766.
2. *Mange Ram v. Brij Mohan*, (1983) 4 SCC 36 at pp. 41-43. AIR 1983 SC 925; *Lalitha J. Rai v. Aithappa Rai*, (1995) 4 SCC 244; *Vidyadhar v. Mamk Rao*, (1999) 3 SCC 573. AIR 1999 SC 1441.

that kind of evidence.<sup>3</sup> The power of the court to examine a witness *suo motu* (on its own motion) is discretionary. It should be exercised to secure the attendance of a witness whose evidence appears to the court to be necessary.<sup>4</sup> The court, however, should not exercise *suo motu* power unless there are compelling reasons to do so.<sup>5</sup> Rules 2 to 4 provide for travelling and other expenses and remuneration of a witness for his attendance in court. A witness cannot be ordered to attend in person unless he resides within the territorial jurisdiction of the court or within certain limits.<sup>6</sup>

### (b) Contents of summons

Every summons issued to a witness should contain the following particulars:

- (a) the time and place at which he is required to attend;
- (b) the purpose of his attendance, i.e. whether his attendance is required for the purpose of giving evidence or to produce a document, or for both the purposes;
- (c) the document which he is called upon to produce should be described with reasonable accuracy.<sup>7</sup>

### (c) Service of summons: Rule 8

Every summons to a witness should be served as nearly as may be in the same manner as a summons to the defendant as contemplated by Order 5.<sup>8</sup> It should give a reasonable time to a witness for preparation and for travelling to the place at which his attendance is required.<sup>9</sup> Rule 7-A provides for direct service of summons (*dasti* summons) by a party and the procedure for such service.

### (d) Failure to comply with summons: Rule 10

The court has power to enforce the attendance of any person to whom a summons has been issued and for that purpose, may (a) issue a warrant for his arrest; (b) attach and sell his property; (c) impose a fine upon him not exceeding five thousand rupees; and (d) order him to furnish

3 S 30(b), Or. 16 R 14 *R M Seshadri v G Vasantha Pai*, (1969) 1 SCC 27 AIR 1969 SC 692, *Lalitha I Rai v Aithappa Rai* (1995) 4 SCC 244

4 *Ibid*, see also *Bishwanath Rai v Sachindanand Singh*, (1972) 4 SCC 707 AIR 1971 SC 1949 *K S Agha Mir Ahmad Shah v Mir Mudassar Shah*, (1943-44) 71 IA 171 AIR 1944 PC 100.

5 *Khap Kharavar Khadir Khan v Siddavanbali Nijalingappa*, (1969) 1 SCC 636 AIR 1969 SC 1034.

6 F 19

7 R 5

8 R 8 See also *supra*, Chap 7

9 R 9

security for his appearance and in default commit him to the civil prison.<sup>10</sup>

Rule 10 enumerates consequences for non-appearance by a party in spite of service of summons. It states that where a person to whom a summons has been issued, either to attend to give evidence or to produce a document, fails to comply with such summons without lawful excuse or intentionally avoids service of summons, the court may issue a proclamation requiring him to attend to give evidence or to produce a document at a time and place mentioned therein and a copy of such proclamation should be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.<sup>11</sup> The court may also issue a warrant for arrest of such person.<sup>12</sup>

Where the person appears after the attachment of his property and satisfies the court that he did not fail to comply with the summons without lawful excuse or did not intentionally avoid service and that he had no notice of the proclamation, the court shall release the property from attachment.<sup>13</sup> If, however, such person does not appear or appears but fails to satisfy the court, the court may impose upon him a fine not exceeding five hundred rupees as it thinks fit, having regard to his condition of life and all the circumstances of the case and attach and sell the property for recovery of the same.<sup>14</sup>

The above provisions enact the machinery for procuring attendance of witnesses. It is the duty of the court to enforce the attendance of witnesses summoned by the parties, if necessary by coercive process.<sup>15</sup> These provisions are essential and have been enacted with a purposeful eye, because the contesting parties in a suit usually have no control over witnesses who may be required to give evidence. The machinery of the court for redress of injustice will be rendered altogether ineffective if a party is not enabled to examine such witnesses as may be necessary in order to procure a just decision from the court on the matter at issue between the parties.<sup>16</sup>

All that a litigant can do in regard to a person over whom he has no control is to request him to attend the court. The said person, however, may, either on account of his preoccupation, or on account of his disinclination to take the trouble to attend the court, refuse to oblige the litigant. In such an event, the litigant would be rendered utterly helpless. And if there were no coercive machinery built in the Code, courts themselves would also be equally helpless. That is the reason why the

10. S. 32.

11. R. 10(1), (2).

12. R. 10(2).

13. R. 11

14. Rr. 12, 13

15. *National Rice & Dal Mills v. Food Corp'n. of India*, AIR 1972 P&H 163 at p. 164. *Vasant Trading Corp'n. v. Dhamanvala Arvind Silk Mills*, (1974) 15 Guj LR 869 at pp 870-71, *Dwarka Prasad v. Rajkunwar Bai*, AIR 1976 MP 214

16. *National Rice & Dal Mills v. Food Corp'n. of India*, AIR 1972 P&H 163.

provisions have been made in Order 16 Rule 10 and the court has been empowered to issue summons to a witness and also to secure compliance with the requisition contained in the summons either to give evidence or to produce documents.<sup>17</sup> Rule 10 thus exhibits the authority of the court.<sup>18</sup>

It should not, however be forgotten that a party runs a serious risk by invoking coercive machinery for compelling his witness to remain present. It is quite likely that on account of such process being issued, he may turn hostile and may not support the case of the party at whose instance he is called as a witness.<sup>19</sup>

Since the provisions of Rule 10 are of a penal nature, the procedure laid down therein must be strictly followed.<sup>20</sup>

It is the duty of the person summoned to give evidence or produce or cause to produce a document.<sup>21</sup> Unless the court otherwise directs, the person summoned should attend the court at each hearing till the suit is disposed of.<sup>22</sup> Rule 18 prescribes the procedure where the witness is arrested and is unable to give evidence or produce documents. Where any party to a suit present in the court, without lawful excuse, refuses when required by the court to give evidence or to produce any document there and then in his possession or power, the court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.<sup>23</sup> Rule 19 deals with cases where a witness cannot be ordered to attend in person unless he is residing within certain limits.

### 3. ATTENDANCE OF WITNESSES IN PRISON: ORDER 16-A

Order 16-A, added by the Amendment Act of 1976, provides for the attendance of prisoners to give evidence if the court is of the opinion that their evidence is material in the suit except where they are physically unfit to do so. However, if the prison is situated at a distance of more than 25 kilometres from the courthouse, no such order shall be made unless the court is satisfied that the examination of such person on commission will not be adequate.

17 *Vasant Trading Corpn. v Dhamanvala Arvind Silk Mills*, (1974) 15 Guj LR 289

18 *Katta Venkatayyaqari v Gowra Lakshmayya*, AIR 1937 Mad 811, *Suresh Nath v Jorawarmal* AIR 1999 Raj 157

19 *Diwarka Prasad v Rajkumari Bai*, AIR 1976 MP 2141 *Kishan Chand v Nirmala Devi*, (1975) 77 PLR 746

20 *Diwarka Prasad v Rajkumari Bai*, AIR 1976 MP 214 at p. 215

21 R 15

22 Rr 16, 17

23 R 20

#### 4. SUMMONS TO PRODUCE DOCUMENTS: SECTION 30

The provisions relating to issue of summons to give evidence will apply to summons to produce documents or other material objects.<sup>24</sup>

#### 5. ADJOURNMENTS: ORDER 17

##### (a) General rule

After the court starts hearing of a suit, it will be continued till the final disposal of the suit. As a general rule, when hearing of evidence has once begun, such hearing shall be continued day to day and the adjournment should be granted only for unavoidable reasons.<sup>25</sup>

##### (b) Discretion of court

A party to the suit, however, may ask for an adjournment of the matter. Normally, to grant or refuse adjournment is at the discretion of the court. The power to grant adjournment is not subject to any definite rules, but it should be exercised judicially and reasonably and after considering the facts and circumstances of each case.<sup>26</sup> The provision limiting adjournments cannot be held to be *ultra vires* or unconstitutional.<sup>27</sup>

##### (c) When adjournment may be granted?

An adjournment may be granted by a court *inter alia* on the grounds of sickness of a party, his witness or his advocate; non-service of summons, reasonable time for preparation of case, withdrawal of appearance by a pleader at the last moment, etc.<sup>28</sup>

24. S. 30; Or. 16, 16-A.

25. Proviso to R. 1 Or. 17. See also *Kishan Lal Gupta v. Dujodwala Industries*, AIR 1977 Del 49 at p. 52.

26. *Thakur Sukhpal Singh v. Thakur Kalyan Singh*, AIR 1963 SC 146 at p. 150 (1963) 2 SCR 733; *Jwala Prasad v. Ajodhya Prasad*, AIR 1983 SC 304; *Savuthri Amma Seethamma v. Aratha Karthy*, (1983) 1 SCC 401; AIR 1983 SC 318; *Nirankar Nath v. Vth ADJ*, (1984) 3 SCC 531 at p. 537; AIR 1984 SC 1268; *R. Viswanathan v. Rukn-ul-Mulk Syed Abdul*, AIR 1963 SC 1; (1963) 3 SCR 22; *Nanik Awtrai Chamanani v. Union of India*, (1970) 2 SCC 321; (1971) 1 SCR 650; *Lachi Tewari v. Director of Land Records*, 1984 Supp SCC 431; AIR 1984 SC 41; *Ranjodh Singh v. State of Punjab*, 1988 Supp SCC 170; *Priddle v. Fisher & Sons*, (1968) 1 WLR 1478; (1968) 3 All ER 506; *Shyam Kishore v. MCD*, (1993) 1 SCC 22; AIR 1992 SC 2279; *CIT v. Express Newspapers Ltd.*, (1994) 2 SCC 374 at p. 377; AIR 1994 SC 1389.

27. *Salem Advocate Bar Assn. v. Union of India*, (2003) 1 SCC 49

28. For leading cases, see, *Authors' Code of Civil Procedure* (Lawyers' Edn) Vol IV, Or. 17.

#### (d) When adjournment may be refused?

An adjournment may be refused by a court *inter alia* on the grounds of engagement of an advocate in another court, unreasonable conduct of a party or his advocate, refusal to examine or cross-examine a witness present in the court, assurance or undertaking by the party or his pleader at the previous hearing to proceed with the case at the next hearing, the case being very old, direction by a superior court to dispose of the matter expeditiously, etc.<sup>29</sup>

#### (e) Power and duty of court

In allowing or refusing adjournment, the court has first to ascertain whether the ground on which adjournment is sought is factually correct and then to decide whether that ground is sufficient to grant adjournment.<sup>30</sup>

Past conduct of a person may well be taken into account as a circumstance in judging whether what he is now saying is true or false, but the fact that a party has applied for adjournment of the hearing of a case in the past and the adjournment was granted on his application, could be no ground for refusing an adjournment if it is again sought on a ground which could reasonably be said to have prevented or disabled that party from producing his evidence or doing something else which is necessary to be done for the hearing of the case on that particular day.<sup>31</sup>

On the one hand, the court should not be too technical in the matter of granting an adjournment and it should not refuse to grant it if sufficient cause is shown. On the other hand, the court should not grant an adjournment if sufficient cause is not shown even on condition of payment of costs. What is a sufficient cause is a question of fact to be decided in the facts and circumstances of each case.

No adjournment shall be granted more than three times to a party during hearing of the suit.<sup>32</sup>

#### (f) Recording of reasons

The court is required to record reasons for granting an adjournment<sup>33</sup>

29. *Ibid*

30. *Haji Abdul Hafiz v Nasir Khan*, AIR 1984 All 16 see also *Maharaja v Harihar*, AIR 1990 All 49, *Brahma Swaroop v Shamsheer Bahadur*, AIR 1984 All 14

31. *Haji Abdul Hafiz v. Nasir Khan*, AIR 1984 All 16 at p. 20, see also *Maharaja v Harihar* AIR 1990 All 49

32. Proviso to R. 1(1)

33. R. 1(1) (2) Proviso (a)

### (g) Last adjournment

Sometimes, an adjournment is granted by the court expressly stating that it is the "*last adjournment*" and on the adjourned date, the party (or his advocate) will proceed with the case. Such order cannot *ex facie* be termed illegal or unlawful. Hence, on the adjourned day, the court may insist the party (or his advocate) to proceed with the case.

But even in such cases, if an adjournment is sought on valid, germane or reasonable ground, it cannot be refused by the court on the sole ground that the previous adjournment was granted "as a last chance."<sup>34</sup>

### (h) Maximum adjournments

Proviso to sub-rule (1) of Order 17, as inserted by the Amendment Act, 1999 mandates that maximum three adjournments can be granted by the court to a party during the hearing of the suit.

In *Salem Advocate Bar Assn. (2) v. Union of India*, the Supreme Court held that in extreme and exceptional circumstances, this strict rule does not apply. The court also held that by "reading down" discretionary power to grant adjournment, the validity of the provision can be sustained.<sup>35</sup>

### (i) Adjournment granted: Illustrative cases

The following are some of the circumstances which have been held to constitute sufficient cause for granting adjournment:

Sickness of a party, his witness or his counsel, non-service of summons, reasonable time for preparation of a case, withdrawal of appearance by a counsel at the last moment, inability of a counsel to conduct the case, inability of a party to engage another advocate, etc.

### (j) Adjournment refused: Illustrative cases

On the other hand, the following are some of the circumstances which have been held not to constitute sufficient cause for granting adjournment:

Engagement of a counsel in another court, strike by lawyers, dilatory conduct of the party, non-examination of a witness present in the court, abuse of process of court, undertaking by the party on the earlier occasion to proceed with the matter, inconvenience to the opposite party

34. *SBI v. Chandra Govindji*, (2000) 8 SCC 532; *Salem Advocate Bar Assn. (2) v. Union of India*, (2005) 6 SCC 344; AIR 2005 SC 3353.

35. (2005) 6 SCC 344; AIR 2005 SC 3353.

or his witnesses, the case being very old, the matter first on board, the argument of the other side is over, interlocutory proceedings, etc.

### (k) Costs of adjournment

While granting an adjournment, the court shall, direct the party seeking an adjournment to pay costs or higher costs to the opposite party.<sup>36</sup>

Such amount, however, should be reasonable and commensurate with the costs incurred by the other side. No costs should be imposed by way of penalty or punishment.<sup>37</sup>

### (l) Failure to appear: Rule 2

Rule 2 provides that where parties fail to appear even on the adjourned day, the court may either proceed to dispose of the suit in one of the modes mentioned in Order 9, or to proceed with the case even in the absence of a party where evidence or substantial portion thereof of such party has already been recorded as if such party were present, or make such other order as it thinks fit.<sup>38</sup> This rule confers on the court a discretion and the court must exercise it.<sup>39</sup> When any party to a suit to whom time has been granted, fails (i) to produce his evidence; or (ii) to cause the attendance of his witnesses; or (iii) to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, (a) if the parties are present, proceed to decide the suit forthwith; or (b) if the parties are, or any of them is, absent, proceed under Rule 2.<sup>40</sup>

Before an order under Rule 3 can be passed, the following conditions must be satisfied:

- (i) the adjournment must have been granted at the instance of a party;
- (ii) the adjournment must have been granted to enable such party (a) to produce his evidence; or (b) to cause the attendance of his witnesses; or (c) to perform any other act necessary for the further progress of the suit; and
- (iii) the party must have failed to perform any of the acts for which the time had been granted.

36 R 1(2)

37 *Juraram Bora v. Saruchohli Kuchum*, AIR 1976 Gau 3; *Ram Pyari v. Lala Ram Narain*, AIR 1973 All 227; 1973 All LJ 257; *Gauhati Bank Ltd. v. Baliram Dutta*, AIR 1950 Ass 169; *Jadavbai v. Shrikisan*, AIR 1946 Bom 113; (1945) 47 Bom LR 978; 224 IC 547.

38 R 2

39 *Sangram Singh v. Election Tribunal*, AIR 1955 SC 425; (1955) 2 SCR 7. See also *Prakash Chander v. Janki Man Chanda*, (1986) 4 SCC 609; AIR 1987 SC 42.

40 R 3

## 6. HEARING OF SUIT: ORDER 18

### (a) Trial in open court: Section 153-B

As a general rule, the evidence of witnesses shall be taken orally in open court in the presence and under the personal direction and superintendence of the judge.<sup>41</sup> It is well-settled that, in general, all cases brought before the courts, whether civil, criminal or others, must be heard in open court. Public trial in open court is undoubtedly essential for the healthy, objective and fair administration of justice. Trial held subject to public scrutiny and gaze naturally acts as a check against judicial caprice or vagaries, and serves as a powerful instrument for creating confidence of the public in the fairness, objectivity and impartiality of the administration of justice. Public confidence in the administration of justice is of such great significance that there can be no two opinions on the broad proposition that in discharging their functions as judicial tribunals, courts must generally hear causes in the open and must permit public admission to the courtroom.

As Bentham<sup>42</sup> has observed:

"In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion, and surest of all guards against improbity. *It keeps the judge himself while trying under trial in the sense that the security of securities is publicity.*"  
(emphasis supplied)

### (b) Trial in camera

A case may, however, occur where the requirement of the administration of justice itself may make it necessary for the court to hold a trial in camera. If the primary function of the court is to do justice in causes before it, then on principle, it is difficult to accede to the proposition that there can be no exception to the rule that all causes must be tried in open court. If the principle that all trials before courts must be held in public was treated as inflexible and universal, and it is held that it admits of no exceptions whatever, cases may arise where, by following the principle, justice itself may be defeated.<sup>43</sup>

41. Or. 18 R. 19, S. 153-B; see also *Naresh Shridhar v. State of Maharashtra*, AIR 1967 SC 1 (1966) 3 SCR 744, *P.N. Eswara Iyer v. Registrar, Supreme Court of India*, (1980) 4 SCC 680; AIR 1980 SC 808.

42. *Scott v. Scott*, 1913 AC 417 (1911-13) All ER Rep 1 at p. 30 (HL). See also, similar observations of Cooley, "The courts could survive only by the strength of public confidence. The public confidence can be fostered by exposing courts more and more to public gaze"; *Constitutional Law* (8th Edn) Vol. I at p. 647.

43. *Naresh Shridhar v. State of Maharashtra*, AIR 1967 SC 1 at p. 8 (1966) 3 SCR 744.

The overriding consideration which must determine the conduct of proceedings before a court is fair administration of justice. Indeed, the principle that all cases must be tried in public is really and ultimately based on the view that it is such public trial of cases that assists the fair and impartial administration of justice. The administration of justice is thus the primary object of the work done in courts; and so, *if there is a conflict between the claims of the administration of justice itself and those of public trial, public trial must yield to the administration of justice.*<sup>44</sup>

(emphasis supplied)

### (c) Right to begin and reply: Rules 1-3

The right to begin follows from the rules of evidence. Sections 101 to 114 of the Evidence Act, 1872 deal with burden of proof. Section 102 of the Act provides that the burden of proof lies on that party who would fail if no evidence at all were given on either side. Accordingly, as a general rule, the plaintiff has to prove his claim and, therefore, he has right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either on point of law (e.g. *res judicata*, limitation, etc.) or on some additional facts alleged by him, the plaintiff is not entitled to any relief. In that case, the defendant has right to begin.<sup>45</sup>

The party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove. The other party shall then state his case and produce his evidence, if any, and may then address the court generally on the whole case. The party beginning may then reply generally on the whole case.<sup>46</sup>

Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence generally on those issues or reserve it by way of answer to the evidence produced by the other party.<sup>47</sup> But if the plaintiff's counsel is absent at the time of hearing or arrives late, and in the meantime the counsel for the defendant starts his arguments, the counsel for the plaintiff has no right of interruption.<sup>48</sup> Where a party wishes to be examined as a witness, he should first offer himself for examination before other witnesses are examined.<sup>49</sup>

44 *Ibid.* at p 10 (AIR). See also *Kehar Singh v. State (Delhi Admn.)* (1988) 3 SCC 609 at pp 672-76 *A.K. Roy v Union of India*, (1982) 1 SCC 271. AIR 1982 SC 710. see also *infra*, Or 32-A Chap 16

45 R 1

46 R 2

47 R 3

48 *Shivela Barse v Union of India*, (1988) 4 SCC 226 at pp 243-44 AIR 1988 SC 2211

49 R 3-A

## (d) Recording of evidence: Rules 4-13

### (i) General

Radical changes have been made by the Code of Civil Procedure (Amendment) Act, 2002 in relation to recording of oral evidence of witnesses.<sup>50</sup> Before the amendment, such evidence could be recorded "in open court in the presence and under the personal direction and superintendence of the judge"<sup>51</sup>. A lot of time of the court was consumed in that process which was the main cause of delay in disposal of cases.

Under the new provision, oral evidence can now be recorded by the Court Commissioner. The Court Commissioner may also record remarks respecting demeanour of witnesses. The report of the Commissioner shall be submitted to the court which shall form part of the record of the suit.<sup>52</sup>

### (ii) Appealable cases

In appealable cases, the evidence of each witness shall be taken down by the judge in the language of the court or in English if the parties or their pleaders do not object. It should be in the form of a narrative and shall be read over to the witness, interpreted to him and signed by the judge. The court may (a) for any special reason, take down any particular question and answer, or any objection to any question; (b) record such remarks as it thinks material respecting the demeanour of any witness; (c) recall any witness at any stage of the suit who has been examined and put such questions as it thinks fit; (d) permit any party to the suit to produce the evidence which was not within his knowledge or could not be produced by him despite due diligence; or (e) make local inspection and make a memorandum of any relevant facts observed at such inspection.<sup>53</sup>

50. Or. 18 R 4 (as amended by the Amendment Act, 2002) (Act 22 of 2002).

51. R 4 as it stood before the amendment read thus:

"Witness to be examined in open court The evidence of the witnesses in attendance shall be taken orally in open court in the presence and under the personal direction and superintendence of the Judge". See also *M.M. Amonkar v. S A. Johari*, (1984) 2 SCC 354; AIR 1984 SC 931.

52. R. 4(1), (2), (3), (4), (5). For analytical discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. IV, Or 18.

53. Ss. 137, 138, Rr. 5-12, 17, 17-A & 18. See also *M M. Amonkar v. S A Johari*, (1984) 2 SCC 354 at pp. 362-63. AIR 1984 SC 931; *Laxman Das v Deoji Mal*, AIR 2003 Raj 74; *F.D.C. Ltd. v. Federation of Medical Representatives Assn. India*, AIR 2003 Bom 371; *Ameer Trading Corpn. Ltd. v. Shapoorji Data Processing Ltd.*, (2004) 1 SCC 702; AIR 2004 SC 355.

**(iii) Non-appealable cases**

In non-appealable cases, the judge shall make or dictate directly on a typewriter or cause to be mechanically recorded, a memorandum of the substance of the deposition of witnesses<sup>54</sup>

**(iv) Examination de bene esse<sup>55</sup>: Rule 16**

Generally, witnesses are examined at the hearing of the suit. Rule 16, however, provides for examination of a witness before the hearing, when he is about to leave the jurisdiction of the court or other sufficient cause is shown to the satisfaction of the court why his evidence should be taken immediately. This is called *de bene esse* examination and it is permitted to do justice between the parties. A witness may be examined on commission in certain circumstances.<sup>56</sup>

**(v) Evidence recorded by another judge: Rule 15**

Where a judge is prevented by death, transfer or other cause from conducting the trial of a suit, his successor may deal with the evidence recorded by him and proceed with the suit from the stage at which it was left.<sup>57</sup>

**(e) Oral arguments: Rule 2 (3-A, 3-D)**

A court may permit a party or his pleader to argue a case orally. For such oral arguments, it is open to the court to fix time limits, as it thinks fit.<sup>58</sup>

**(f) Written arguments: Rule 2 (3-A-3-C)**

A court may allow a party or his pleader to submit written arguments in support of his case. Such written arguments shall form part of the record. A copy of such written arguments should be supplied to the other side. Normally, no adjournment should be granted for submitting written arguments.<sup>59</sup>

54 R 13

55 R 16

56 See *supra* Chap 11

57 R 15

58 For detailed discussion and case law see VG Ramachandran, *Law of Writs* (2006) Vol II, Pt V Chap 2

59 *Ibid*

# CHAPTER 15

## Judgment and Decree

### SYNOPSIS

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### 1. GENERAL

After the hearing is completed, the court will pronounce the judgment. Rules 1 to 5 of Order 20 deal with judgments and Rules 6 to 19 with decrees. Rules 6-B and 20 provide for furnishing of copies of judgment and decree to the parties on application made by them on payment of specified charges. Whereas Sections 34 and 35 relate to interest and

costs, Sections 35-A and 35-B make provisions for compensatory costs for false and vexatious claims or defences and for causing delay. Order 20-A covers miscellaneous expenses.

## 2. JUDGMENT

### (a) Definition: Section 2(9)

"Judgment" means the statement given by the judge of the grounds of a decree or order.<sup>1</sup> In the words of Vivian Bose, J., a judgment may be said to be "the final decision of the court intimated to the parties and to the world at large by formal 'pronouncement' or 'delivery' in open court".<sup>2</sup>

### (b) Essentials<sup>3</sup>

### (c) Judgment and decree<sup>4</sup>

### (d) Pronouncement of judgment: Rule 1

After the hearing has been completed, the court shall pronounce the judgment in open court, either at once or on some future day, after giving due notice to the parties or their pleaders.<sup>5</sup> Once the hearing is over, there should not be a break between the reservation and pronouncement of judgment.

Before the Amendment Act of 1976, no time-limit was provided between the hearing of arguments and the delivery of the judgment. There was a persistent demand all over India for imposing a time-limit for the delivery of a judgment after the conclusion of hearing of a case. Even the Supreme Court had to observe in the case of *R.C. Sharma v. Union of India*<sup>6</sup> thus:

"The Civil Procedure Code does not provide a time-limit for the period between the hearing of arguments and the delivery of a judgment. Nevertheless, we think that an unreasonable delay between hearing of arguments and delivery of a judgment, unless explained by exceptional or extraordinary circumstances, is highly undesirable even when written arguments are submitted. It is not unlikely that some points which the litigant considers important may have escaped notice. But, what is more important is that litigants must have complete confidence in the results of litigation. This confidence tends to be shaken if there is excessive delay

1. S. 2(9).

2. *Surendra Singh v. State of U.P.*, AIR 1954 SC 194 at p. 196, 1954 SCR 330.

3. See *supra*, Pt I Chap. 2.

4. See *supra*, Pt I Chap. 2.

5. S. 33, Or. 20 R. 1(1). See also *Surendra Singh v. State of U.P.*, AIR 1954 SC 194 at pp. 196-97, 1954 SCR 330, *Nirankar Nath v. Vth ADJ* (1984) 3 SCC 531 at p. 537, AIR 1984 SC 1268, *Anil Rai v. State of Bihar*, (2001) 7 SCC 318, AIR 2001 SC 3173.

6. (1976) 3 SCC 574 at p. 578, AIR 1976 SC 2037 at p. 2041.

between hearing of arguments and delivery of judgments. *Justice, as we have often observed, must not only be done but must manifestly appear to be done.*"  
(emphasis supplied)

The Joint Committee, therefore, suggested that a time-limit should be prescribed for delivery of judgments after the conclusion of the hearing of cases.<sup>7</sup> Accordingly, it is provided that if a judgment is not pronounced at once, it should ordinarily be delivered within thirty days from the conclusion of the hearing. Where, however, it is not practicable to do so due to exceptional and extraordinary circumstances, it may be pronounced within sixty days. Due notice of the day fixed for pronouncement of judgment shall be given to the parties or their pleaders.<sup>8</sup> The judge need not read out the whole judgment and it would be sufficient if the final order is pronounced.<sup>9</sup> The judgment must be dated and signed by the judge.<sup>10</sup> Rule 2 enables a judge to pronounce a judgment which is written but not pronounced by his predecessor.

A reference in this connection may be made to a decision of the Supreme Court in *Anil Rai v. State of Bihar*<sup>11</sup>. In that case, after the arguments of the counsel were over but the judgment was reserved by the High Court which was pronounced after two years. The action was strongly deprecated by the Supreme Court.

The Court was conscious that for High Courts no particular period was prescribed for pronouncement of judgment, but the judgment must be pronounced expeditiously. Sethi, J. stated, "In a country like ours where people consider judges only second to God, efforts be made to strengthen that belief of the common man. Delay in disposal of the cases facilitates the people to raise eyebrows, sometime genuinely, which, if not checked, may shake the confidence of the people in the judicial system."<sup>12</sup>

Pronouncement of a judgment is essential for the validity of the judgment. It is a judicial act which must be performed in a judicial way. Small irregularities in the manner of pronouncement or the mode of delivery may not matter much but the substance must be present and it should neither be vague nor left to inference or conjecture.<sup>13</sup>

Moreover, the judgment must be based on the grounds and points in the pleadings and not outside the case put forward by the parties in their pleadings. On the one hand, the court should record findings on all the points raised by the parties. And, on the other hand, it should

7. Statement of Objects and Reasons

8. Proviso to R 1(1). 9. R. 1(2)

10. R 3.

11. (2001) 7 SCC 318; AIR 2001 SC 3173.

12. *Ibid*, at p. 330 (SCC); at p. 3180 (AIR), see also *S.K. Verma v. M.P. High Court*, (2003) 10 SCC 243.

13. *Surendra Singh v. State of U.P.*, AIR 1954 SC 194 at p. 196. 1954 SCR 330.

not decide any question which does not arise from the pleadings of the parties or is unnecessary.<sup>14</sup>

A statement of fact recorded in the judgment is conclusive of the fact so stated and no one should be allowed to assail it as incorrect or contradict it by filing an affidavit or otherwise. If a party to the proceedings thinks that the happenings in the court have not been correctly recorded in the judgment, a party should approach the same court, to call the attention of the very judge who has recorded the statement and to have it deleted altogether or amended accordingly.<sup>15</sup>

Finally, all judicial pronouncements must be truly judicial in nature and should not depart from sobriety, moderation and reserve. The language of the judgment should be dignified and restrained. Disparaging and defamatory remarks should not be made and, even where criticism is justified, it must be in the language of utmost restraint, keeping in mind that the person making the comment is also a human being and fallible.<sup>16</sup>

### (e) Copy of judgment

After the judgment is pronounced, copies of the judgment should be made available to the parties immediately on payment of charges.<sup>17</sup>

### (f) Contents of judgment: Rules 4-5

Judgments other than those of a Court of Small Causes should contain (i) a concise statement of the case, (ii) the points for determination, (iii) the decision thereon, and (iv) the reasons for such decision. The judgments of a Court of Small Causes need not contain more than the point for determination and the decisions thereon.<sup>18</sup>

In suits in which issues have been framed, the court must record its finding on each separate issue with the reasons therefor.<sup>19</sup> Recording

14. *Swaran Lata v H K. Banerjee*, (1969) 1 SCC 709. AIR 1969 SC 1167, *Bhagwati Prasad v Delhi State Mineral Development Corpn.*, (1990) 1 SCC 361. AIR 1990 SC 371. *Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd.*, (1983) 1 SCC 147. AIR 1983 SC 239. *R S Nayak v A R Antulay*, (1984) 2 SCC 183.

15. *State of Maharashtra v Ramdas Shrinivas Nayak*, (1982) 2 SCC 463. AIR 1982 SC 1249. *Bhagwati Prasad v Delhi State Mineral Development Corpn.*, (1990) 1 SCC 361, *Foremam Lata v M L Wadhwan*, (1987) 4 SCC 48 at p. 51.

16. *Alok Kumar Roy v Dr S N Sinha*, AIR 1968 SC 453 at pp. 456-57. (1968) 1 SCR 813. *State of M P v Nandial*, (1986) 4 SCC 615. AIR 1987 SC 251 at p. 287. *Ashok Kumar v State of Haryana*, (1985) 4 SCC 417. AIR 1987 SC 454 at pp. 461-63. *A M Mathur v Pramod Kumar Gupta*, (1991) 2 SCC 533 at p. 539. AIR 1990 SC 1737 at p. 1741.

17. R. 6 B.

18. Rr. 4-6. See also *supra* Pt I Chap. 2.

19. R. 5. See also *Fomento Resorts and Hotels Ltd. v G R Da Cruz Pinto*, (1985) 2 SCC 152 at p. 162. AIR 1985 SC 736 at p. 741. *State of Punjab v Hardyal*, (1985) 2 SCC 629 at p.

of reasons in support of a judgment may or may not be considered to be one of the principles of natural justice, but it cannot be denied that recording of reasons in support of a decision is certainly one of the visible safeguards against possible injustice and arbitrariness and affords protection to the person adversely affected.<sup>20</sup>

It is the duty of the court to deal with all the submissions made by the counsel at the Bar. It would be unfair and "highly improper" if arguments are not referred to in the judgment.<sup>21</sup> This is also necessary because if a particular point is not dealt with in the judgment, a superior court may say that no such point had been raised or argued before the court below.<sup>22</sup>

Where several authorities are cited before the court, it is open to the Presiding Officer to deal with only those which are relevant and apposite. Mere noting down of cases would be doing injustice to the party and his counsel who had taken pains to find out authorities in support of his case.<sup>23</sup>

A judgment must be a self-contained document from which it should appear as to what were the facts of the case and what was the controversy which was tried to be settled by the court and in what manner. The process of reasoning by which the court came to a particular conclusion and decreed or dismissed the suit should clearly be reflected in the judgment.<sup>24</sup>

Whether it is a case contested by the defendant by filing a written statement, or a case which proceeds *ex parte* and is ultimately decided in the absence of the defendant, or a case in which no written statement was filed and was decided under Order 8 Rule 10, the court has to write a judgment which must be in conformity with the provisions of the Code.<sup>25</sup>

Rule 6-B provides for furnishing of a copy of judgment to the party on payment of charges for preferring an appeal. Rule 5-A states that where the parties are not represented by pleaders, the court should inform the parties as to the court to which an appeal lies against the judgment pronounced and the period of limitation for filing such appeal, and place on record the information so given to the parties. Rule 20 provides for furnishing of certified copies of judgments and decrees to parties.

636: AIR 1985 SC 920 at pp. 923-24

20. For detailed discussion of recording of reasons, see, *Authors' Lectures on Administrative Law* (2012) Lecture VI.

21. *Balkrishna Chaturbhuj Thacker v. Devabai*, AIR 1985 Guj 133 (1985) 1 Guj LR 321

22. *State of Maharashtra v. Ramdas Shrinivas Nayak*, (1982) 2 SCC 463 AIR 1982 SC 1249

23. *Ramanlal v. Hima Ind*, (1994) 3 Civ IJ 370

24. *Balraj Taneja v. Sunil Madan*, (1999) 8 SCC 396. AIR 1999 SC 3381 at p. 3390.

25. *Ibid*, at pp. 414-15 (SCC). at p. 3391 (AIR).

**(g) Alteration in judgment: Rule 3**

A judgment once signed cannot afterwards be amended or altered except (i) to correct clerical or arithmetical mistakes, or errors due to accidental slips or omissions (Section 152); or (ii) on review (Section 114).<sup>26</sup>

**3. DECREE****(a) Definition<sup>27</sup>****(b) Essentials<sup>28</sup>****(c) Decree and judgment<sup>29</sup>****(d) Deemed decree<sup>30</sup>****(e) Types of decree<sup>31</sup>****(f) Necessity of decree**

The Code requires passing of decree in all suits. A decree is thus an essential part of the ultimate outcome of the suit. Decree is an indispensable requisite. An appeal lies against a decree and not against a judgment.<sup>32</sup> Without decree an appeal cannot be "put in motion". A decree is, therefore, an absolute necessity.

**(g) Drawing up of decree: Rule 6-A**

A decree should be drawn up within fifteen days from the date of the judgment. If the decree is not drawn up, an appeal can be preferred without filing a copy of the decree.<sup>33</sup>

**(h) Form of decree**

A decree should be in the form prescribed by Appendix D to the (First) Schedule with necessary variations.

**(i) Contents of decree: Rule 6**

The decree shall follow the judgment, agree with it and bear (i) the number of the suit; (ii) the names and description of the parties and

26 R 3 See also *Samarendra Nath v Krishna Kumar* AIR 1967 SC 1440 (1967) 2 SCR 18, *Kewal Chand v S K Sen* (2001) 6 SCC 512 AIR 2001 SC 2569

27 S 2 (2), see also *supra*, Pt I, Chap 2

28 See *supra*, Pt I, Chap 2

29 See *supra*, Pt I, Chap 2

30 See *supra*, Pt I, Chap 2

31 See *supra*, Pt I, Chap 2

32 S 96, see also *infra*, Pt III, Chap 2

33 R 6 A

their registered addresses; (iii) the particulars of the claim; (iv) the relief granted; (v) the amount of costs incurred in the suit, and by whom or out of what property and in what proportions they are to be paid; (vi) the date on which the judgment was pronounced; and (vii) the signature of the judge.<sup>34</sup> Rule 8 authorises a successor judge to sign a decree drawn up by his predecessor.

### (j) Decrees in special cases: Rules 9-19

Rules 9 to 19 deal with decrees in particular cases. In a suit for recovery of immovable property, the decree shall contain a description of such property sufficient to identify it, e.g. boundaries, survey numbers, etc.<sup>35</sup> A decree for delivery of movable property must state the amount of money to be paid as an alternative if delivery cannot be had.<sup>36</sup> In a decree for payment of money, the court may order that the payment of decretal amount shall be postponed or shall be made by instalments with or without interest.<sup>37</sup> In a suit for recovery of possession of immovable property, the court may pass a decree (1) for possession of property; (2)(a) for past rent or mesne profits; or (b) direct an inquiry as to such rent or mesne profits; (c) direct an inquiry as to future rent or mesne profits; and (3) final decree in respect of rent or mesne profits in accordance with the result of such inquiry.<sup>38</sup>

A decree for specific performance of a contract for sale or lease of immovable property shall specify the period within which the purchase money or other sum is to be paid by the purchaser or the lessee.<sup>39</sup>

In a suit for an account of any property and for its due administration under the decree of the court, before passing a final decree, the court should pass a preliminary decree ordering accounts to be taken and inquiries to be made. Thereafter a final decree shall be passed in accordance with the result of the preliminary inquiry.<sup>40</sup> A decree in a pre-emption suit, where the purchase money has not been paid into court, shall specify a day on or before which the purchase money shall be paid and direct that on payment into court of such purchase money, the defendant shall deliver possession of the property to the plaintiff, but that if the payment is not made, the suit shall be dismissed with costs. Where the court has adjudicated upon rival claims to pre-emption, the decree shall direct (i) if the claims decreed are equal in degree, that the claim of each pre-emptor shall take effect proportionately; and (ii) if the claims decreed are different in degree, the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to make payment.<sup>41</sup>

34. S. 33, Rr. 6, 7. See also *Jagat Dhush v. Jawahar Lal*, AIR 1961 SC 832 (1961) 2 SCR 918.

35. R 9.

36. R. 10.

37. R 11.

38. R 12

39. R. 12-A.

40. R 13

41. R 14.

In a suit for dissolution of partnership or taking of partnership accounts, the court, before passing a final decree may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved and directing accounts to be taken and other acts to be done.<sup>42</sup> In a suit for accounts between a principal and an agent, the court, before passing a final decree, shall pass a preliminary decree directing the accounts to be taken.<sup>43</sup> The court can give special directions regarding mode of taking accounts.<sup>44</sup>

In a decree passed in a suit for the partition of property or for the separate possession of a share therein, (i) if the estate is assessed to the payment of revenue to the government, the decree shall declare the rights of several parties interested in the property but shall direct partition or separation to be made by the Collector (Section 54);<sup>45</sup> (ii) in other cases of immovable property, if the partition or separation cannot conveniently be made without further inquiry, the court may pass a preliminary decree declaring the rights of parties in the property and giving necessary directions and thereafter a final decree shall be passed.<sup>46</sup> A decree where the defendant has been allowed a set-off or counterclaim against the claim of the plaintiff shall state what amount is due to the plaintiff and what amount is due to the defendant.<sup>47</sup>

#### 4. INTEREST: SECTION 34

##### (a) Interest: Meaning

The term "interest" is not defined in the Code. It may mean "a charge that is paid to borrow for use of money". It is thus a compensation allowed by law to the person who has been prevented to use the amount to which he was entitled.<sup>48</sup>

##### (b) Award of interest

Where the decree is for payment of money, the court may award interest at such rate as it thinks reasonable on the "principal sum adjudged".<sup>49</sup>

42 R 15

43 R 16

44 R 17

45 R 18(1)

46 R 18(2)

47 R 19

48 Concise Oxford English Dictionary (2002) at p 737. *Union Bank of India v. Dalpat Gaurishankar*, AIR 1992 Bom 482 at p 489; 1992 Mah LJ 686 (FB); *Rural Engg. Division Cuttack v. Surendranath Kamnig*, AIR 1980 Ori 119.

49 S 34. For detailed discussion, see: Authors, *Code of Civil Procedure* (Lawyers Edn.) Vol 1 at pp 606-41.

### (c) Divisions of interest

Interest awarded by the court may conveniently be divided under three heads:

- (i) Interest prior to filing of suit;
- (ii) Interest *pendente lite*, i.e. from the date of the suit to the date of the decree; and
- (iii) Interest from the date of decree till the payment.

Let us consider all the heads:

#### (i) Interest prior to suit

Section 34 has no application to interest prior to the institution of the suit since it is a matter of substantive law. It can be awarded only when there is an agreement, express or implied, between the parties; or mercantile usage; or under a statutory provision; or by way of damages.<sup>50</sup>

#### (ii) Interest *pendente lite*

The award of interest from the date of the suit to the date of the decree is at the discretion of the court.<sup>51</sup> The discretion, however, must be exercised on sound judicial principles. As a general rule, the court should award interest at the contractual rate except where it would be inequitable to do so.<sup>52</sup>

#### (iii) Interest from date of decree

The award of interest from the date of decree to the date of payment is also at the discretion of the court.<sup>53</sup> The proviso as added by the Amendment Act of 1976 empowers the court to grant further interest at a rate exceeding six per cent per annum but not exceeding the

50. *Union of India v. Watkins Mayor & Co.*, AIR 1966 SC 275; *Mahabir Prasad v. Durga Datta*, AIR 1961 SC 990. (1961) 3 SCR 639; *Vithaldas v. Rup Chand*, AIR 1967 SC 188; 1966 Supp SCR 164; *E.I.D. Parry (India) Ltd. v. Labour Court, Madras*, 1991 Supp (1) SCC 326; AIR 1991 SC 1544; *Supdt. Engineer v. Subba Reddy*, (1999) 4 SCC 423; AIR 1999 SC 1747.

51. *Mahabir Prasad case*, (1971) 1 SCC 265; *State of M.P. v. Nathabhai*, (1972) 4 SCC 396; AIR 1972 SC 1545; *Indian Insurance & Banking Corpn. Ltd. v. Mani Paravathu*, (1971) 3 SCC 893; *W.B. Financial Corpn. v. Bertram Scott (I) Ltd.*, AIR 1983 Cal 381; *Executive Engineer v. Abhaduta Jena*, (1988) 1 SCC 418. AIR 1988 SC 1520; (1988) 1 SCR 253.

52. *Rangalal v. Utkal Rasterbhasa Prachar Coop. Press & Publishing Society Ltd.*, AIR 1975 Ori 137 at p. 138; *Tika Sao v. Hari Lal*, AIR 1941 Pat 276 at p. 280; *Abdul Hussain v. Seth Fazalbhai*, ILR 1957 Bom 529 at p. 531, *K. Appa Rao v. V.L. Varadraj*, AIR 1981 Mad 94.

53. *Amar Chand v. Union of India*, AIR 1964 SC 1658; *LIC v. Gangadhar*, (1989) 4 SCC 297; AIR 1990 SC 185; *Trojan & Co. v. R.M.N.N. Nagappa Chettiar*, AIR 1953 SC 235; 1953 SCR 789; *Vijaya Bank v. Art. Trend Exports*, AIR 1992 Cal 12.

contractual rate of interest, and in the absence of a contract to that effect, at the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions, provided that the liability arises out of a commercial transaction.

#### (d) Rate of interest

Rate of interest is also at the discretion of the court. If there is an agreement between the parties, normally, the court will adhere to it and will award interest as agreed unless there are reasons to depart therefrom.<sup>54</sup> From the date of the suit such rate would be six per cent per annum.<sup>55</sup> Where the plaintiff is a bank or financial institution, the rate of interest would be that on which advance is made by such an institution.<sup>56</sup>

#### (e) Recording of reasons

Where the court grants interest at the agreed rate, it need not record reasons. But where it awards interest at a lesser rate than the agreed rate between the parties, it should record reasons so that it can be considered whether the discretion has been exercised judicially or not.<sup>57</sup>

#### (f) Commercial transactions

Where the transaction in question is a "commercial transaction", i.e. a transaction connected with industry, trade or business, the rate of interest would be that on which moneys are lent or advanced by nationalised banks in relation to commercial transactions.<sup>58</sup>

"In commercial transactions, grant of interest at the contractual rate ought to be the rule and grant of interest at reduced rate is a rare exception."<sup>59</sup>

#### (g) Compound interest

Compound interest means interest on interest. Normally, compound interest is not allowed by a court under Section 34 of the Code. But if

54. *Mahesh Chandra v. Krishna Swaroop*, (1997) 10 SCC 681; *Union Bank of India v. Narendra Plastics*, AIR 1991 Guj 67. (1990) 2 Guj LR 1283. (1990) 2 Guj LH 555, *Associated Construction & Engg. Co. v. Dhanlaxmiben*, AIR 1997 Guj 39; (1997) 1 Guj LR 256

55. *Indian Insurance & Banking Corpn. Ltd. v. Mani Paravathu*, (1971) 3 SCC 893

56. *Union Bank of India v. Narendra Plastics*, AIR 1991 Guj 671. See also *infra*, "Commercial transactions".

57. *Vijaya Bank v. Art Trend Exports*, AIR 1992 Cal 12

58. Proviso to S. 34(1).

59. *Karnataka State Financial Corpn. v. Nithyananda Bhavan*, AIR 1982 Kant 179 at p. 181. *Bank of Baroda v. Tiger Electric Motors Co.*, 1985 Guj LH 1021. *Gurdev Singh v. Punjab National Bank*, AIR 1998 P&H 106 ILR (1998) 2 P&H 116 (1998) 118 PLR 537

there is an agreement to that effect or it has been charged during the course of transaction, such interest can be awarded.<sup>60</sup>

### (h) Inflation

In some cases, judicial notice of inflation has been taken by courts for awarding higher rate of interest. "Inflation is a phenomenon of which this court (Supreme Court) has to strike a balance between the competing equities."<sup>61</sup>

### (i) Decree silent as to interest: Effect

Where the decree does not provide for interest, it will be deemed to have been refused.<sup>62</sup>

### (j) Interest by arbitrator

Interest can be awarded by an arbitrator.<sup>63</sup>

### (k) Interest in mortgage suits

Interest can be awarded in mortgage suits.<sup>64</sup>

### (l) Interest in writ petitions

In appropriate cases, interest can be awarded by a writ-court (Supreme Court or High Court) while exercising powers under Articles 32, 226, 227 or 136 of the Constitution.<sup>65</sup>

## 5. COSTS: SECTIONS 35, 35-A, 35-B; ORDER 20-A

### (a) General rule

As a general rule, to award costs is at the discretion of the court. Normally, in civil proceedings, "costs shall follow the event".<sup>66</sup>

60. *Panna Lal v. Nihal Chand*, AIR 1922 PC 46; *State of Punjab v. Scheduled Caste Coop. Land Owning Society Ltd.*, AIR 1988 P&H 192.

61. *Union of India v. Muffakam Jah (I)*, 1995 Supp (1) SCC 686; AIR 1995 SC 498 at p. 507; *Shree Hanuman Jute Mills v. Brij Kishore*, 1987 Supp SCC 61.

62. S. 34(2), see also *State of Punjab v. Krishan Dayal Sharma*, AIR 1990 SC 2177.

63. For cases see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. I at pp. 630-33.

64. Or. 34 R. 11.

65. For detailed discussion, see, V.G. Ramachandran, *Law of Writs* (2006) Vol. II, Vol. V, Chap. 2.

66. S. 35. For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. I at pp. 645-47.

## (b) Kinds of costs

The Code provides for the following kinds of costs:

- (i) General costs—Section 35;
- (ii) Miscellaneous costs—Order 20-A;
- (iii) Compensatory costs for false and vexatious claims or defences—Section 35-A; and
- (iv) Costs for causing delay—Section 35-B.

### (i) General costs: Section 35

(A) *Object*.—Section 35 deals with general costs. The object of awarding costs to a litigant is to secure to him the expenses incurred by him in the litigation.<sup>67</sup> It neither enables the successful party to make any profit out of it nor punishes the opposite party.<sup>68</sup>

(B) *"Costs shall follow the event"*.—The general rule relating to costs is that costs should follow the event, i.e. a successful party must get the costs and the losing party should pay to the other side.<sup>69</sup>

(C) *Principles*.—The primary rules in respect of award of general costs are as under:

- (A) Costs are at the discretion of the court. The said discretion, however, must be exercised on sound legal principles and not by caprice, chance or humour. No hard and fast rules can be laid down and the discretion must be exercised considering the facts and circumstances of each case.
- (B) Normally, costs should follow the event and the successful party is entitled to costs unless there are good grounds for depriving him of that right.<sup>70</sup> To put it differently, the loser pays costs to the winner. However, it does not always depend on who wins and who loses in the end. Even a successful

67. *Nandlal Tanti v. Jagdeo Singh*, AIR 1962 Pat 36 at p. 38; *Ganesh Das v. Munsif, South Lucknow*, AIR 1976 All 111 at pp. 115-16, *N. Peddanna Ogeti v. Katta V. Srinivasayya Setti Sons*, AIR 1954 SC 26 at p. 28, *Mohd. Mahibulla v. Seth Chaman Lal*, (1991) 4 SCC 529, AIR 1993 SC 1241, *Ashok Kumar v. Ram Kumar*, (2009) 2 SCC 656.

68. *N. Peddanna Ogeti v. Katta V. Srinivasayya Setti Sons*, AIR 1954 SC 26 at p. 28, *Anandji Haridas and Co. v. State*, AIR 1977 Guj 140 at p. 144 (1977) 18 Guj LR 271 (FB), *Ganadhar Mahton v. Ambika Prasad Tewari*, AIR 1925 PC 169, *Vernekar Industries v. Starit Engg. Co. (P) Ltd.*, AIR 1985 Bom 253.

69. *Tungabhadra Industries Ltd. v. Govt. of A.P.* AIR 1964 SC 1372 (1964) 5 SCR 174, *Jugraj Singh v. Jaswant Singh*, (1970) 2 SCC 386, AIR 1971 SC 761, *Kali Prasad v. Ram Prasad*, (1974) 1 SCC 182, AIR 1974 SC 148, *Ashok Kumar v. Ram Kumar* (2009) 2 SCC 656.

70. *Jugraj Singh v. Jaswant Singh*, (1970) 2 SCC 386, AIR 1971 SC 761, *Kali Prasad v. Ram Prasad*, (1974) 1 SCC 182, AIR 1974 SC 148, *Tungabhadra Industries Ltd. v. Govt. of A.P.*, AIR 1964 SC 1372 (1964) 5 SCR 174, *Ashok Kumar v. Ram Kumar* (2009) 2 SCC 656.

party may be deprived of costs if he is guilty of misconduct or there are other reasons to do so.<sup>71</sup> Sub-section (2) of Section 35, however, expressly provides that when the court orders that costs should not follow the event, it must record reasons for doing so.<sup>72</sup>

### (ii) Miscellaneous costs: Order 20-A

Order 20-A makes specific provision with regard to the power of the court to award costs in respect of certain expenses incurred in giving notices, typing charges, inspection of records, obtaining copies and producing witnesses.

### (iii) Compensatory costs: Section 35-A

(A) *Object*.—Section 35-A provides for compensatory costs. This section is an exception to the general rule on which Section 35 is based, viz. that the “costs are only an indemnity, and never more than indemnity”.<sup>73</sup> This section is intended to deal with those cases in which Section 35 does not afford sufficient compensation in the opinion of the court. Under this provision, if the court is satisfied that the litigation was inspired by vexatious motive and was altogether groundless, it can take deterrent action.<sup>74</sup> This section applies only to suits and not to appeals or to revisions.

(B) *Conditions*.—The following conditions must exist before this section can be applied:<sup>75</sup>

- (1) the claim or defence must be false or vexatious;

71. *Col. A.S. Iyer v. V. Balasubramanyam*, (1980) 1 SCC 634; AIR 1980 SC 452; *Union of India v. Kamal Kumar*, AIR 1974 Cal 231; *Saroj Rani v. Sudarshan Kumar Chadha*, (1984) 4 SCC 90. AIR 1984 SC 1562, *K N. Guruswamy v. State of Mysore*, AIR 1954 SC 592. (1955) 1 SCR 305.

72. *Jugraj Singh v. Jaswant Singh*, (1970) 2 SCC 386. AIR 1971 SC 761; *Ouseph Varghese v. Joseph Aley*, (1969) 2 SCC 539; (1970) 1 SCR 921.

73. *Gundry v. Sainsbury*, (1910) 1 KB 645 at p. 650. See also *Anandji case*, AIR 1977 Guj 140; *Ashok Kumar v. Ram Kumar*, (2009) 2 SCC 656; *N. Peddanna Ogeti v. Katta V. Srinivasayya Setti Sons*, AIR 1954 SC 26. For general principles as to costs, see, *Authors', Code of Civil Procedure (Lawyers' Edn.) Vol. I* at pp 655-56.

74. *T. Arivandanam v. T.V. Satyapal*, (1977) 4 SCC 467 at p. 470. AIR 1977 SC 2421 at p. 2423; *Priya Wart v. State of Haryana*, (1982) 2 SCC 142; *Milli Talimi Mission v. State of Bihar*, (1984) 4 SCC 500 at pp 513-14; AIR 1984 SC 1757 at p 1765; *Prem Narain v. Vishnu Exchange Charitable Trust*, (1984) 4 SCC 375 at p. 376; AIR 1984 SC 1896 at p 1897; *Manmohan Kaur v. Surya Kant*, (1988) 4 SCC 698 at p. 704; *S A Kini v. Union of India*, 1985 Supp SCC 122; AIR 1985 SC 893, *Morgan Stanley Mutual Fund v. Kartick Das*, (1994) 4 SCC 225 at p. 246.

75. S. 35-A(1).

- (2) objections must have been taken by the other party that the claim or defence was false or vexatious to the knowledge of the party raising it; and
- (3) such claim must have been disallowed or withdrawn or abandoned in whole or in part.

(C) *Maximum amount.*—The maximum amount that can be awarded by the court is Rs 3000. But a person against whom an order has been passed is not exempt from any criminal liability. In a subsequent suit for damages or compensation for false, frivolous or vexatious claim or defence, the court will take into account the amount of compensation awarded to the plaintiff under this section.<sup>76</sup>

(D) *Other liability.*—A person against whom an order of costs is made is not exempted from any other liability in respect of false or vexatious claim or defence made by him.

(E) *Appeal.*—An order awarding compensatory costs is appealable.<sup>77</sup> But no appeal lies against an order refusing to award compensatory costs.<sup>78</sup> Since such an order can be termed as "case decided", a revision lies.<sup>79</sup>

#### (iv) Costs for causing delay: Section 35-B

Section 35-B is added by the Amendment Act of 1976. It is inserted to put a check upon the delaying tactics of litigating parties. It empowers the court to impose compensatory costs on parties who are responsible for causing delay at any stage of the litigation. Such costs would be irrespective of the ultimate outcome of the litigation.<sup>80</sup> The payment of costs has been a condition precedent for further prosecution of the suit, if the party concerned is a plaintiff and the defence, if he is a defendant.<sup>81</sup>

The provisions of this section are mandatory in nature and, therefore, the court should not allow prosecution of suit or defence, as the case may be, in the event of a party failing to pay costs as directed by the court. If, however, a party is unable to pay costs due to circumstances beyond his control, such as strike of advocates or staff, declaration of the last day for payment of costs as a holiday, etc the court can extend the time.<sup>82</sup>

76 S. 35-A(3), (4).

77 S. 104(1)(ff).

78 S. 104(1), Proviso.

79. *Purna Chandra v Secy. of State*, AIR 1937 Pat 477, see also *infra*, Pt. III, Chap. 9

80. Statement of Objects and Reasons

81. *Hakmi v Pitamber*, AIR 1978 P&H 145 at p. 146; *Vernekar Industries v Staril Engg. Co (P) Ltd*, AIR 1985 Bom 253; *Prem Sagar v Phul Chand*, AIR 1983 P&H 385 (FB)

82. *Anand Parkash v Bharat Bhushan*, AIR 1981 P&H 269 (FB).

Recently, in *Ashok Kumar v. Ram Kumar*<sup>83</sup>, the Supreme Court observed that the present system of levying meagre costs in civil matters is wholly unsatisfactory and does not act as a deterrent to vexatious or luxury litigation. More realistic approach relating to costs is the need of the hour.

83 (2009) 2 SCC 656 at p. 659.

# CHAPTER 16

## Special Suits

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## 1. GENERAL

For the purpose of procedure, suits may be divided into two classes, namely, (1) suits in general cases; and (2) suits in special cases. We have already discussed in the preceding chapters the procedure required to be followed in the former class of suits. Sections 79 to 93 and Orders 27 to 37 deal with suits in special or particular cases and the procedure to be followed in such suits.

## 2. SUITS IN SPECIAL CASES

### (1) Suits by or against Government or public officers: Sections 79-82; Order 27

#### (a) General

Sections 79 to 82 and Order 27 of the Code lay down procedure where suits are brought by or against the Government or public officers. The provisions, however, prescribe procedure and machinery and do not deal with rights and liabilities enforceable by or against the Government. Substantive rights are to be determined in accordance with the provisions of the Constitution.<sup>1</sup>

#### (b) Statutory of notice: Section 80(1)

In ordinary suits, i.e. suits between individuals and individuals, notice need not be given to the defendant by the plaintiff before filing a suit. Section 80 of the Code, however, declares that no suit shall be instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of:

- (i) in the case of a suit against the Central Government, except where it relates to a railway, a Secretary to that Government;
- (ii) in the case of a suit against the Central Government where it relates to a railway, the General Manager of that railway;
- (iii) in the case of a suit against the Government of the State of Jammu and Kashmir, the Chief Secretary to that Government or any other officer authorized by that Government in that behalf,

1 *Bhagchand v Secy of State* (1926-27) 54 IA 338 AIR 1927 PC 176 see also *State of Serakella v Union of India*, AIR 1951 SC 253 at p. 266 1951 SCR 474 *Sawai Singhai Nirmal Chand v Union of India*, AIR 1966 SC 1068 at pp. 1071-72 (1966) 1 SCR 986. Arts. 294-300, Constitution of India, see also, Authors' *Lectures on Administrative Law* (2012) Lecture X

- (iv) in the case of a suit against any other State Government, a Secretary to that Government or the Collector of the district; and
- (v) in the case of a public officer, such public officer.<sup>2</sup>

(c) Nature and scope

Section 80 of the Code enacts a rule of procedure and mandates that no suit shall be instituted against the Government or against a public officer until a statutory notice required by the section is served.

The section enumerates two types of cases:

- (1) Suits against the Government; and
- (2) Suits against public officers in respect of acts done or purporting to be done by such public officers in their official capacity.

Regarding the first class of cases, the notice must be given in all cases. Regarding the second class of cases, however, notice is necessary only where the suit is in respect of any act "purporting to be done" by such public officer in the discharge of his duty, and not otherwise.<sup>3</sup>

(d) Object of notice

The primary object underlying Section 80 is to afford an opportunity to the Government or public officer to consider the legal position and to settle the claim put forward by the prospective plaintiff if the same appears to be just and proper. The Government, unlike private parties, is expected to consider the matter objectively and dispassionately and after obtaining proper legal advice, it can take an appropriate decision in the public interest within a period of two months allowed by the section by saving public time and money and without driving a person to avoidable litigation. The legislative intent behind the provision is that public money should not be wasted for unnecessary litigation. The section has been intended to alert the Government or a public officer to negotiate just claims and to settle them if well-founded without adopting an unreasonable attitude by inflicting wasteful expenditure on the public exchequer.<sup>4</sup>

2. S. 80.

3. *State of Bihar v. Jivan Das*, AIR 1971 Pat 141; 1970 Pat LJR 387; *Kanailal Karmakar v. Governor General for India in Council*, AIR 1948 Pat 164; *Amalgamated Electricity Co. (Belgaum) Ltd. v. Municipal Committee, Ajmer*, AIR 1969 SC 227 at p. 231 (1969) 1 SCR 430; *State of Maharashtra v. Chander Kant*, (1977) 1 SCC 257 at pp. 259-60; AIR 1977 SC 148 at p. 150; see also *infra*, "Acts purporting to be done".

4. *State of Madras v. C.P. Agencies*, AIR 1960 SC 1309, *Amar Nath v. Union of India*, AIR 1963 SC 424; (1963) 1 SCR 657; *Raghunath Das v. Union of India*, AIR 1969 SC 674; (1969) 1 SCR 450; *State of Punjab v. Geeta Iron & Brass Works Ltd.*, (1978) 1 SCC 68; AIR 1978 SC 1608; *Ghanshyam Dass v. Dominion of India*, (1984) 3 SCC 46; AIR 1984

The provision of notice thus is intended to alert the Government or public officer to negotiate just settlement or at least have the courtesy to tell the "potential outsider" why his claim is being resisted.<sup>5</sup>

In *Bihari Chowdhary v. State of Bihar*<sup>6</sup>, the purpose behind the provision has been highlighted by the Supreme Court thus:

"When we examine the scheme of the section it becomes obvious that the section has been enacted as a measure of public policy with the object of ensuring that before a suit is instituted against the Government or a public officer, the Government or the officer concerned is afforded an opportunity to scrutinise the claim in respect of which the suit is proposed to be filed and if it be found to be a just claim, to take immediate action and thereby avoid unnecessary litigation and save public time and money by settling the claim without driving the person, who has issued the notice, to institute the suit involving considerable expenditure and delay. The Government, unlike private parties, is expected to consider a matter covered by the notice in a most objective manner, after obtaining such legal advice as they may think fit, and take a decision in public interest within the period of two months allowed by the section as to whether the claim is just and reasonable and the contemplated suit should, therefore, be avoided by speedy negotiations and settlement or whether the claim should be resisted by fighting out the suit if and when it is instituted. There is clearly a public purpose underlying the mandatory provision contained in the section insisting on the issuance of a notice setting out the particulars of the proposed suit and giving two months' time to Government or a public officer before a suit can be instituted against them. *The object of the section is the advancement of justice and the securing of public good by avoidance of unnecessary litigation.*"<sup>7</sup> (emphasis supplied)

#### (e) Law Commission's view

The Law Commission did not favour in retaining the provision of issuing notice under Section 80 before filing a suit by the aggrieved party.

Before more than fifty years, it noted that the section has worked hardship in a large number of cases where immediate relief was needed. The evidence disclosed that in large majority of cases, the Government or the public officer made no use of opportunity afforded by the section. In most cases the notice remained unanswered. In large number of cases, Government and public officers utilised the provision as a

SC 1004, *Bihari Chowdhary v. State of Bihar*, (1984) 2 SCC 627 AIR 1984 SC 1043, *Bhagchand v Secy of State*, (1926-27) 54 IA 338 AIR 1927 PC 176, *Dhian Singh v Union of India*, AIR 1958 SC 274 1958 SCR 781, *Beohar Rajendra Sinha v State of M P* (1969) 1 SCC 796 AIR 1969 SC 1256, *Ratan Lal v Union of India*, (1989) 3 SCC 537 AIR 1990 SC 104.

5 *State of Punjab v Geeta Iron & Brass Works Ltd*, (1978) 1 SCC 68 AIR 1978 SC 1608

6 (1984) 2 SCC 627 AIR 1984 SC 1043

7 *Ibid.* at pp 629-30 (SCC) at p 1044 (AIR)

"technical defence" and in a number of cases, the objection had been upheld by the court defeating just claims of the citizens.<sup>8</sup>

The Commission again considered the question. It noted that it was unable to find a parallel provision in any other country governed by the Anglo-Saxon system of law. It opined that in a democratic country like ours there should ordinarily be no distinction of the kind envisaged by Section 80 between the citizen and the State.<sup>9</sup>

In spite of the above well-considered reasoning and recommendation, the Joint Committee of Parliament favoured retention of the provision in "public interest".<sup>10</sup>

It is, however, submitted that the suggestion of the Law Commission should have been accepted and the provision as to notice ought to have been deleted as virtually it has not achieved the object for which it had been introduced. Moreover, even in absence of such a provision, it is always open to a court of law to issue notice and call upon the Authorities before granting any relief or without causing administrative inconvenience which can be seen from the exercise of extraordinary jurisdiction by the Supreme Court under Article 32 or by the High Courts under Article 226 of the Constitution.<sup>11</sup>

#### (f) Essentials

A notice under Section 80 must contain (i) name, description and place of residence of the person giving notice; (ii) a statement of the cause of action; and (iii) relief claimed by him.

In considering whether the essential requirements of the section have been complied with, the court should ask the following questions:<sup>12</sup>

- (i) Whether the name, description and residence of the plaintiff are given so as to enable the authorities to identify the person giving the notice?
- (ii) Whether the cause of action and the relief which the plaintiff claims have been set out with sufficient particulars?
- (iii) Whether such notice in writing has been delivered to or left at the office of the appropriate authority mentioned in the section? and

8. Law Commission's Fourteenth Report at pp. 475-76.

9. Law Commission's Twenty-seventh Report at pp. 21-22.

10. Report of the Joint Committee.

11. For detailed discussion, see, V.G. Ramachandran, *Law of Writs* (2006) Vol. II, Pt IV, Chap. II.

12. *State of A.P. v. Gundugola Venkata*, AIR 1965 SC 11 at p. 15; (1964) 4 SCR 945; *Beohar Rajendra Sinha v. State of M.P.*, (1969) 1 SCC 796; AIR 1969 SC 1256, *Ghanshyam Dass v. Dominion of India*, (1984) 3 SCC 46; AIR 1984 SC 1004.

- (iv) Whether the suit has been instituted after the expiration of two months after notice has been served, and the plaint contains a statement that such a notice has been so delivered or left?

**(g) Notice whether empty formality**

Statutory notice is not an empty formality. The object is to afford an opportunity to the Government or a public officer to reconsider the matter in the light of the settled legal position and take an appropriate decision in accordance with law. Such notice has, however, become an empty formality. The administration is often unresponsive and shows no courtesy even to intimate the aggrieved party why his claim is not accepted.<sup>13</sup>

In *State of Punjab v. Geeta Iron & Brass Works Ltd.*<sup>14</sup>, Krishna Iyer, J. also stated, "We like to emphasize that Governments must be made accountable by parliamentary social audit for wasteful litigative expenditure inflicted on the community by inaction. A statutory notice of the proposed action under Section 80 CPC is intended to alert the State to negotiate a just settlement or at least have the courtesy to tell the potential outsider why the claim is being resisted. Now Section 80 has become a ritual because the administration is often unresponsive and hardly lives up to Parliament's expectation in continuing Section 80 in the Code despite the Central Law Commission's recommendations for its deletion. An opportunity for settling the dispute through arbitration was thrown away by sheer inaction. A litigative policy for the State involves settlement of governmental disputes with citizens in a sense of conciliation rather than in a fighting mood. Indeed, it should be a directive on the part of the State to empower its law officer to take steps to compose disputes rather than continue them in Court. *We are constrained to make these observations because much of the litigation in which Governments are involved adds to the caseload accumulation in Courts for which there is public criticism. We hope that a more responsive spirit will be brought to bear upon governmental litigation so as to avoid waste of public money and promote expeditious work in Courts of cases which deserve to be attended to.*" (emphasis supplied)

**(h) Notice whether mandatory**

The provisions of Section 80 are express, explicit and mandatory and admit no implications or exceptions. They are imperative in nature and

13 Report of the Joint Committee, Gazette of India, dt. 1-4-1976 Pt. II, S. 2, Extra at pp. 804-09. See also *Ghanshyam Dass v. Dominion of India*, (1984) 3 SCC 46, AIR 1984 SC 1004, *Bihari Chowdhary v. State of Bihar* (1984) 2 SCC 627, AIR 1984 SC 1043, *State of Punjab v. Geeta Iron & Brass Works Ltd.*, (1978) 1 SCC 68, AIR 1978 SC 1608, *Raghunath Das v. Union of India*, AIR 1969 SC 674, (1969) 1 SCR 450.

14 (1978) 1 SCC 68 at p. 69, AIR 1978 SC 1608 at p. 1609.

must be strictly complied with. Notice under Section 80 is the first step in the litigation.<sup>15</sup> No court can entertain a suit unless the notice is duly served under sub-section (1) of Section 80. If the section has done injustice, it is a matter which can be rectified by a legislature and not by a court.<sup>16</sup>

As the Supreme Court<sup>17</sup> has observed, "The section is imperative and must undoubtedly be strictly construed; failure to serve a notice complying with the requirements of the statute will entail dismissal of the suit."

### (i) Construction of notice

The provisions of Section 80 of the Code must be strictly complied with. But it cannot be overlooked that it is a procedural provision, a machinery by which courts impart justice. A notice under this section, therefore, should not be construed in a pedantic manner divorced from common sense.<sup>18</sup>

Pollock stated, "We must import a little common sense into notice of this kind. A statutory notice must be reasonably construed, keeping in mind the ultimate object that an interpretation should not lead to injustice. Every venial defect or error not going to the root of the matter cannot be allowed to defeat justice or to afford an excuse to the Government or a public officer to deny just claim of an aggrieved party."<sup>19</sup>

The question has to be decided by reading the notice as a whole in a reasonable manner. If on such reading, the court is satisfied that the plaintiff has shown to have given the necessary information which the statute requires him to give to the defendants, inconsequential defect or error is immaterial and it will not vitiate the notice. As observed by the Supreme Court, the provisions of the section are not intended to be used as booby-traps against ignorant and illiterate persons.<sup>20</sup>

15. *State of Serakella v. Union of India*, AIR 1951 SC 253; 1951 SCR 474.

16. *Bhagchand v. Secy of State*, (1926-27) 54 IA 338; AIR 1927 PC 176; *Dhian Singh v. Union of India*, AIR 1958 SC 274; 1958 SCR 781; *State of Madras v. C.P. Agencies*, AIR 1960 SC 1309; *Amar Nath v. Union of India*, AIR 1963 SC 424; (1963) 1 SCR 657; *Sawai Singhai Nirmal Chand v. Union of India*, AIR 1966 SC 1068; (1966) 1 SCR 986; *Ghanshyam Dass v. Dominion of India*, (1984) 3 SCC 46; AIR 1984 SC 1004.

17. *State of A.P. v. Gundugola Venkata*, AIR 1965 SC 11 at p. 15; (1964) 4 SCR 945; *Ghanshyam Dass v. Dominion of India*, (1984) 3 SCC 46; AIR 1984 SC 1004.

18. *State of Madras v. C.P. Agencies*, AIR 1960 SC 1309; *S.N. Dutt v. Union of India*, AIR 1961 SC 1449; (1962) 1 SCR 560; *State of A.P. v. Gundugola Venkata*, AIR 1965 SC 11 at p. 15; (1964) 4 SCR 945; *Dhian Singh v. Union of India*, AIR 1958 SC 274; 1958 SCR 781; *Raghunath Das v. Union of India*, AIR 1969 SC 674; (1969) 1 SCR 450.

19. *Jones v. Nicholls*, (1844) 13 M&W 361 at p. 363; 153 ER 149 at p. 150.

20. *Ghanshyam Dass v. Dominion of India*, (1984) 3 SCC 46; AIR 1984 SC 1004; *State of A.P. v. Gundugola Venkata*, AIR 1965 SC 11 at p. 15; (1964) 4 SCR 945; *Raghunath Das v. Union of India*, AIR 1969 SC 674 (1969) 1 SCR 450.

## (j) "Act purporting to be done in official capacity"

The expression "any act purporting to be done by such public officer in his official capacity" takes within its sweep acts as also illegal omissions. Likewise, it also covers past as well as future acts. All acts done or which could have been done under the colour or guise by an officer in the ordinary course of his official duties would be included therein.<sup>21</sup>

If the allegations in the plaint relate to an act purporting to be done by a public officer, whatever the relief prayed for, the section is attracted and a notice is mandatory.<sup>22</sup> Again, an act does not mean any particular, specific or instantaneous act of a person but denotes a series of acts.<sup>23</sup> Moreover, the words "acts purporting to be done" apply to misfeasance as well as non-feasance.<sup>24</sup>

Such acts, however, must be *bona fide* and they must have some nexus with the duty of the officer.<sup>25</sup> The expression "any act purporting to be done by such public officer in his official capacity" connotes that the act must be such as could ordinarily be done by a person in the ordinary course of his official duties. It does not cover acts outside the sphere of his duties.<sup>26</sup> "There must be something in the nature of the act complained of which attaches to the official character of the person doing it."<sup>27</sup>

The test is whether the officer can reasonably claim protection for his act or it was performed by him purely in his private or individual capacity. In the case of the former, a notice under Section 80 is necessary, in the case of the latter, it is not.<sup>28</sup>

21. *Samanthala Koti v. Pothuri Subbiah*, AIR 1918 Mad 62: (1917) 41 Mad 792: 34 MLJ 494 (FB), *Gill v. R.*, (1947-48) 75 IA 41: AIR 1948 PC 128, *Pukhraj v. State of Rajasthan*, (1973) 2 SCC 701: AIR 1973 SC 2591; *K. Satwant Singh v. State of Punjab*, AIR 1960 SC 266
22. *State of Madras v. Chitturi Venkata*, AIR 1957 AP 675: ILR 1956 Andh 114 1956 AnWR 54: 1956 ALT 106.
23. S. 3(2), General Clauses Act, 1897; see also *Amalgamated Electricity Co. (Belgaum) Ltd v. Municipal Committee Ajmer*, AIR 1969 SC 227 at p. 231: (1969) 1 SCR 430; *State of Maharashtra v. Chander Kant*, (1977) 1 SCC 257 at p. 260: AIR 1977 SC 148 at p. 150
24. *State of Maharashtra v. Chander Kant*, (1977) 1 SCC 257 at p. 260: AIR 1977 SC 148 at p. 150, *Ramaswami Ayyangar v. State of T.N.*, (1976) 3 SCC 779 at p. 783: AIR 1976 SC 2027 at p. 2031, see also, S. 34, IPC
25. *Chhaganlal v. Collector, Kaira*, ILR (1910) 35 Bom 42 7 IC 993, *Samanthala Koti v. Pothuri Subbiah*, AIR 1918 Mad 62 (1917) 41 Mad 792: 34 MLJ 494 (FB)
26. *Ibid*
27. *State of Maharashtra v. Chander Kant*, (1977) 1 SCC 257 at p. 260: AIR 1977 SC 148 at p. 150
28. *Ibid*, see also *Amalgamated Electricity Co. (Belgaum) Ltd v. Municipal Committee Ajmer*, AIR 1969 SC 227 at p. 231: (1969) 1 SCR 430; *Gill v. R.*, (1947-48) 75 IA 41: AIR 1948 PC 128; *Hori Ram Dri v. Emperor*, AIR 1939 FC 43 1939 FCR 159

**(k) Waiver of notice**

Though issuance of a notice under Section 80 is mandatory and a condition precedent for the institution of a suit, the provision is merely procedural in nature and not a substantive one. It does not affect the jurisdiction of the court. A notice under Section 80 is for the benefit of the Government or public officer. It is, therefore, open to the Government or public officer to waive such benefit.<sup>29</sup> The question whether, in fact, there is waiver or not would necessarily depend on the facts of each case and is liable to be tried by the same court if raised.<sup>30</sup>

**(l) Form of notice**

A notice under Section 80 need not be in a particular form as no form has been prescribed by the Code for the purpose. It is sufficient if the notice complies with the requirements of the section. It should contain details sufficient to inform the party of the nature and basis of the claim and the relief sought.<sup>31</sup>

**(m) Mode of service**

A notice under Section 80 of the Code should be delivered to, or left at the office of, the appropriate authority specified in the section.<sup>32</sup> It should be given to the Secretary of the department of the Government or the Collector of the District. Personal delivery of the notice is, however, not necessary. If such interpretation is adopted, the words "or left at his office" will become nugatory. Hence, such notice can either be served personally or be sent by registered post.

**(n) Technical defect in notice: Section 80(3)**

Sub-section (3) to Section 80 as inserted by the Code of Civil Procedure (Amendment) Act, 1976 clarifies that no suit instituted against the Government or public officer shall be dismissed merely on the ground of error or defect in the notice, if, in such notice, the name, description and residence of the plaintiff had been so given as to enable the authority or public officer to identify the person serving the notice and such notice had been delivered or left at the office of the authority or public

29. *Vellayan Chettiar v. Province of Madras*, (1946-47) 74 IA 223; AIR 1947 PC 197; *Dhian Singh v. Union of India*, AIR 1958 SC 274; 1958 SCR 781.

30. *Ibid*, see also *Vasant Ambadas v. Bombay Municipal Corpn.*, AIR 1981 Bom 394 at p. 396 (FB); *Commr. of Taxes v. Golak Nath*, AIR 1979 Gau 10 at p. 12.

31. *S.N. Barick v. State of W.B.*, AIR 1963 Cal 79; *Nannah v. Union of India*, AIR 1964 Raj 41; *Amar Nath v. Union of India*, AIR 1963 SC 424 at p. 428-29 (1963) 1 SCR 657.

32. *State of A.P. v. Gundugola Venkata*, AIR 1965 SC 11; (1964) 4 SCR 945

officer and the cause of action and the relief claimed by the plaintiff had been substantially indicated therein.

The above sub-section has been added with a view to ensuring that just claims of aggrieved parties will not be defeated on technical grounds. Now, a notice under Section 80 cannot be held invalid and no suit can be dismissed on the ground that there is technical defect or error in the notice or that the service of such notice is irregular.<sup>33</sup>

The Joint Committee stated:

"The Committee also feel that with a view to seeing that the just claims of many persons are not defeated on technical grounds, the suit against the Government or the public officer should not be dismissed merely by reason of any technical defect or error in the notice or any irregularity in the service of the notice if the name, description and residence of the plaintiff have been so given in the notice as to enable the appropriate authority or public officer to identify the person serving the notice, and the notice had been delivered or left at the office of the appropriate authority, and the cause of action and the relief claimed have been substantially indicated in the notice."<sup>34</sup>

#### (o) Exclusion of period of notice

In computing the period of limitation for instituting a suit against the Government or public officer, the period of notice has to be excluded.<sup>35</sup>

#### (p) Leave of court: Urgent relief: Section 80(2)

Sub-section (2) of Section 80 as inserted by the Code of Civil Procedure (Amendment) Act, 1976 enables the plaintiff to institute a suit against the Government or public officer for obtaining urgent or immediate relief with the leave of the court even without serving notice to the Government or public officer.<sup>36</sup> This sub-section, thus, engrafts an exception to the rule laid down in sub-section (1) of Section 80 and allows the plaintiff to obtain urgent relief in grave cases even without issuing notice.<sup>37</sup>

The object underlying this provision is to prevent failure or miscarriage of justice in urgent cases. It is the urgency and immediate relief

33 S. 80(3), see also *S N Dutt v Union of India*, AIR 1961 SC 1449 (1962) 1 SCR 560 *Raghunath Das v Union of India*, AIR 1969 SC 674 (1969) 1 SCR 450, *State of A P v Gundugola Venkata* AIR 1965 SC 11 (1964) 4 SCR 945

34 Report of the Joint Committee, Gazette of India, dt 1-4-1976, Pt II, S. 2, Extra, at pp 804-09

35 S. 15(2), Limitation Act, 1963, see also *Jai Chand v Union of India*, (1969) 3 SCC 642, *Amar Chand v Union of India* (1973) 1 SCC 115 AIR 1973 SC 113

36 S. 80(2), see also *Ghanshyam Dass v Dominion of India*, (1984) 3 SCC 46 AIR 1984 SC 1004.

37 *Ghanshyam Dass v Dominion of India*, (1984) 3 SCC 46 AIR 1984 SC 1004 at p 1011

which would weigh with the court while dealing with a prayer to dispense with the requirement of a notice and not the merits of the case.

Sub-section (2), however, enacts that in such a case, the court shall not grant relief, whether interim or otherwise, except after giving to the Government or public officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed for in the suit.<sup>38</sup>

#### (q) Writ petition

A writ petition under Article 32 or 226 of the Constitution cannot be said to be a "suit" within the meaning of Section 80 of the Code. Hence, giving of prior notice to the Government or public officer is not necessary before filing a petition in the Supreme Court or in a High Court.<sup>39</sup>

#### (r) Computation of limitation

In computing the period of limitation for filing a suit, the period of notice should be excluded.<sup>40</sup>

#### (s) Premature suit

A suit instituted before the expiry of two months of notice as required by Section 80 of the Code is liable to be dismissed only on that ground.<sup>41</sup>

#### (t) Appeal

An order passed under Section 80 is neither a "decree" nor an appealable order and, hence, no appeal lies against such order.<sup>42</sup>

#### (u) Revision

An order under Section 80 of the Code is a "case decided" under Section 115 of the Code and is, therefore, revisable. If a court subordinate to the High Court makes an order which is patently illegal and suffers from jurisdictional error, it can be corrected by the High Court.<sup>43</sup>

38. S 79.

39. *Soorajmull v Controller of Customs*, AIR 1952 Cal 103; *Province of Bombay v. Khushaldas S Advani*, AIR 1950 SC 222; 1950 SCR 621, *N. Parameswara Kurup v. State of T.N*, AIR 1986 Mad 126.

40. S 15(2), Limitation Act, 1963.

41. *Bihari Chowdhary v. State of Bihar*, (1984) 2 SCC 627 at p. 631; AIR 1984 SC 1043 at p. 1045.

42. *State of Gujarat v. K.R. Nayar*, 1982 Guj LH 987; *Kailash Chandra v. State of M P.*, AIR 1992 MP 242; 1991 MP LJ 754; 1991 Jab LJ 524.

43. *Ishwarlal v. State of Maharashtra*, ILR 1966 Guj 660; (1966) 7 Guj LR 589; *Muktaree Devi v. State of Manipur*, AIR 1978 Gau 17.

**(v) Title of suit: Section 79**

In a suit by or against the Government, the authority to be named as plaintiff or defendant, as the case may be, shall be:

- (a) in the case of a suit by or against the Central Government, the Union of India; and
- (b) in the case of a suit by or against the State Government, the State.<sup>44</sup>

**(w) Statement in plaint**

A plaint can be presented after the expiration of two months of notice, which must contain a statement that a statutory notice under Section 80 of the Code has been delivered or left as required by sub-section (1) of the said section. An omission to make such a statement is fatal and, in its absence, the plaint will be rejected by the court.<sup>45</sup>

**(x) Parties**

Where a suit is filed against a public officer in respect of any act purporting to be done by him in his official capacity, the Government should be joined as a party to the suit.<sup>46</sup>

**(y) Procedure: Order 27**

In a suit by or against the Government, the plaint or written statement shall be signed by any person appointed by the Government who is acquainted with the facts of the case.<sup>47</sup> Persons authorized to act for the Government shall be deemed to be recognized agents under the Code.<sup>48</sup> A Government Pleader can receive summons on behalf of the Government.<sup>49</sup> A counsel for the State need not file a *vakalatnama*. Reasonable time should be granted to the Government for filing a written statement.<sup>50</sup> In all suits against the Government or public officers, it is the duty of the court to assist in arriving at a settlement.<sup>51</sup>

Order 27-A provides that in a suit (or appeal) in which substantial question of law relating to interpretation of the Constitution is involved, the court must issue notice to the Attorney General of India if the

44 *State of A P v. Gundugola Venkata*, AIR 1965 SC 11 at p. 15 (1964) 4 SCR 945. *Gangappa Gurupadappa v. Rachawwa*, (1970) 3 SCC 716 at p. 721. AIR 1971 SC 442 at p. 446. *Bihari Chowdhary v. State of Bihar*, (1984) 2 SCC 627. AIR 1984 SC 1043.

45 S. 79, see also, Or. 27 Rr. 3-5-A.

46 Or. 27 R. 1.

47 R. 2.

48 R. 4.

49 R. 5.

50 Ss. 81-82, Or. 27, see also *Collector Northern Sub-Division v. Comunidade of Bombolim*, (1995) 5 SCC 333.

51 R. 5-B, see also, S. 89, as inserted by the Amendment Act of 1999.

question of law concerns the Central Government and to the Advocate General of the State if the question concerns the State Government.<sup>52</sup>

### (z) Other privileges

Rule 5-A provides that when a suit is filed against a public officer in respect of any act alleged to have been done by him in his official capacity, the government should be joined as a party to the suit. Rule 5-B casts a duty on the Court in suits against the Government or public officers to assist in arriving at a settlement. Rule 7 provides for extension of time to enable a public officer to make a reference to the Government where he is the defendant. Rule 8-A provides that no security shall be required from the Government or from any public officer sued in respect of an act alleged to have been done by him in his official capacity.

Section 81 provides that in a suit filed against a public officer in respect of any act purporting to be done by him in his official capacity, the court shall exempt him from appearing in person if it is satisfied that he cannot absent himself from his duty without detriment to the public service. He shall not be liable to arrest, nor his property shall be liable to be attached otherwise than in execution of a decree.

Section 82 enacts that no execution shall be issued on any decree passed against the Government or a public officer unless it remains unsatisfied for three months from the date of the decree.<sup>53</sup>

## (2) Suits by aliens: Section 83

Alien enemies residing in India, with the permission of the Central Government, and alien friends, may sue in any court otherwise competent to try a suit, as if they were citizens of India. Alien enemies residing in India without such permission or residing in a foreign country, cannot sue in any court.<sup>54</sup> Every person residing in a country which is at war with India shall be deemed to be an Indian enemy.<sup>55</sup>

## (3) Suits by or against Foreign Rulers, Ambassadors and Envoys: Sections 84-87-A

A foreign State may sue in any competent court, provided that such suit is for the enforcement of private right vested in the Ruler of that State or in any officer of such State in his public capacity.<sup>56</sup> "Foreign

52. For detailed discussion, see *infra*, "Suits relating to constitutional validity of statutory instruments: Order 27-A".

53. S. 82. For detailed discussion, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. II, Ss. 79-82 at pp. 1-107.

54. S. 83.

55. Expln. to S. 83.

56. S. 84.

State" means any State outside India which has been recognized by the Central Government.<sup>57</sup>

A Ruler of a foreign State may sue in the name of his State. Likewise, a Ruler of a foreign State may be sued in the name of his State.<sup>58</sup> The term "Ruler", in relation to a foreign State, means the person who is for the time being recognized by the Central Government to be the head of that State.<sup>59</sup>

The Central Government may, at the request of the Ruler of a foreign State, appoint any person to prosecute or defend a suit on behalf of such Ruler. Such a person appointed by the Central Government shall be deemed to be a recognized agent under the Code of the Ruler of a foreign State.<sup>60</sup>

Section 86(1) enacts that no suit shall be instituted against a foreign State, a Ruler of a foreign State, or an Ambassador or Envoy of a foreign State without the consent of the Central Government. Such consent shall not be given unless the Central Government is satisfied that the conditions laid down in sub-section (2) of Section 86 have been fulfilled.

Likewise, no decree can be executed against the property of any foreign State or a Ruler of a foreign State or an Ambassador or Envoy of a foreign State, except with the consent of the Central Government. Similarly, a Ruler of a foreign State, an Ambassador, an Envoy, a High Commissioner of a Commonwealth country or any other member of his staff, as the Central Government may specify, cannot be arrested under the Code.

It is, however, made clear that where a request is made to the Central Government for the grant of consent, before refusing the request either as a whole or in part, the Central Government must afford to the person seeking such consent reasonable opportunity of being heard.<sup>61</sup>

#### (4) Suits by or against Rulers of former Indian States: Section 87-B

In the case of any suit by or against the Ruler of any former Indian State which is based wholly or partly upon a cause of action which arose before the commencement of the Constitution the same can be filed in accordance with the provisions in relation to suits by or against foreign Rulers, Ambassadors and Envoys.<sup>62</sup>

57 S 87-A(a).

58 S 87

59. S 87-A(b)

60. S. 85.

61 *Gaekwar Baroda State Railway v Hafiz Habib-ul-Haq*, (1937-38) 65 IA 182 AIR 1938 PC 165, *Mohanlal Jain v Sawai Man Singhji*, AIR 1962 SC 73 (1961) 1 SCR 702, *Mirza Ali Akbar Kashani v United Arab Republic*, AIR 1966 SC 230 (1966) 1 SCR 319 *Veh Deutfracht v New Central Jute Mills Co. Ltd.* (1994) 1 SCC 282 AIR 1994 SC 516. *Harbhajan Singh v Union of India*, (1986) 4 SCC 671 AIR 1987 SC 9

62 S 87-B(1), see also *Tokendra Bir Singh v Govt of India*, AIR 1964 SC 1663, *Usmanali Khan v Sagar Mal*, AIR 1965 SC 1798, *Mohan Lal v. Sawai Man Singh*, (1961) 1 SCR 702

"Former Indian State" means any such Indian State as the Central Government may, by notification in the Official Gazette, specify for the purpose of Section 87-B of Code.<sup>63</sup>

### (5) Suits by or against soldiers, sailors and airmen: Order 28

Where any soldier, sailor or airman is a party to the suit who is in actual service, and is unable to obtain leave for prosecuting or defending the suit *in personam*, he may authorize any person to sue or defend him.<sup>64</sup> The person so authorized may himself prosecute or defend the suit or appoint a pleader.<sup>65</sup> Summons on a soldier, sailor or airman may be served through his commanding officer.<sup>66</sup>

### (6) Suits by or against corporations: Order 29

A "corporation" is a fictitious or imaginary person invested by law with the attribute of a person. It can sue and be sued in its corporate name, e.g.

"A.B. Company Ltd. having its registered office at ..."

Rule 1 of Order 29 provides that in suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by (i) the secretary; or (ii) any director; or (iii) other principal officer of the corporation able to depose to the facts of the case. Summons may be served as provided in Rule 2.<sup>67</sup> The Court may at any stage of the suit require the personal appearance of any of the abovenamed officers, who may be able to answer material questions relating to the suit.<sup>68</sup>

### (7) Suits by or against partnership firms: Order 30

#### (a) Suits by or against partners: Rule 1

Two or more persons claiming or being liable as partners and carrying on business in India may sue or be sued in the name of the firm of which they were partners when the cause of action accrued. Any party to a suit may, in such a case, apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accrual of the cause of action, partners in such firm. In a suit by or

63. S. 87-B(2); see also *Narottam Kishore Deb v. Union of India*, AIR 1964 SC 1590: (1964) 7 SCR 55; *Tripura Goods Transport Assn. v. Commr. of Taxes*, (1998) 2 SCC 264. AIR 1998 SC 465.

64. Or. 28 R. 1.

65. R. 2.

66. R. 3.

67. See *supra*, Chap. 7; see also *Shahmar Rope Works v. Abdul Hussain*, (1980) 3 SCC 595.

68. Or. 29 R. 3; see also *Ram Chand & Sons Sugar Mills (P) Ltd. v. Kanhayalai Bhargava*, AIR 1966 SC 1899: (1966) 3 SCR 856, *United Bank of India v. Naresh Kumar*, (1996) 6 SCC 660: AIR 1997 SC 3.

against a firm, any pleading may be signed and verified by any one of the partners.<sup>69</sup>

Rule 2 enables a defendant to ask for the disclosure of the names of the partners where the suit is filed by the partners in the name of the firm.<sup>70</sup>

**(b) Service of summons: Rules 3-5**

Rule 3 provides for service of summons upon the firm and its partners.<sup>71</sup> Rule 4 declares that if any of the partners dies before filing or during the pendency of the suit, it is not necessary to join his legal representative as a party to the suit. Rule 5 lays down that when a summons is issued to a firm under Rule 3, every person served shall be informed by notice whether he is served as a partner or as a person having control or management of the partnership business, or in both capacities. In the absence of such a notice, the person shall be deemed to be served as a partner.

**(c) Appearance by partners: Rules 6-8**

The defendant-partners shall appear individually in their own names. All subsequent proceedings, however, shall continue in the name of the firm.<sup>72</sup> If a notice is served on a person having control or management over the partnership business, he need not appear unless he is a partner.<sup>73</sup> Rule 8 enables a person who is served with a summons as a partner to appear under protest and deny that he was a partner at the material time and have the issue as to his being a partner tried at the trial. If the Court holds that he was a partner at the material time, it does not preclude him from denying the liability of the firm. On the other hand, if the Court holds that he was not a partner of the firm and is not liable as such, it does not preclude the plaintiff from serving a summons on the firm and proceeding with the suit.<sup>74</sup>

**(d) Suits between co-partners: Rule 9**

Order 30 applies also to suits between a firm and one or more of its partners therein and to suits between firms having one or more partners in

69. Or 30 R 1; see also *Gambhir Mal v J K Jute Mills Co Ltd*, AIR 1963 SC 243 (1963) 2 SCR 190, *Purushottam Umedbhai & Co v Manual & Sons*, AIR 1961 SC 325 (1961) 1 SCR 982, *Mandalsa Devi v M Ramnaram (P) Ltd*, AIR 1965 SC 1718 (1965) 3 SCR 421.

70. *Gambhir Mal v J K Jute Mills Co Ltd* (ibid).

71. See *supra* Chap 7.

72. R 6.

73. R 7.

74. *Mohatta Bros v Bharat Survyodaya Mills Co Ltd*, (1976) 4 SCC 420 at p 426 AIR 1976 SC 1703 at p 1709 10, *Ganesh Trading Co v Maji Ram*, (1978) 2 SCC 91 AIR 1978 SC 484.

common. No execution, however, can be issued in such suits except with the leave of the court.<sup>75</sup>

**(e) Suits against persons carrying on business in names of others: Rule 10**

Any person carrying on business in a name or style other than his own name, or a Hindu undivided family carrying on business under any name, may be sued in such name or style as if it were a firm name, and, insofar as the nature of such case permits, all rules under Order 30 shall apply accordingly.<sup>76</sup>

**(f) Decree in partnership suits**

Order 20 Rule 15 of the Code provides for passing of a preliminary decree by the court before passing a final decree in a suit for dissolution of partnership or taking of partnership accounts.

**(g) Execution of decree against partnership firm**

Order 21 Rules 49 and 50 provide for execution of a decree against a partnership firm and for attachment of partnership property.<sup>77</sup>

**(8) Suits by or against trustees, executors and administrators: Order 31**

In suits between strangers and persons beneficially interested in the property vested in trustees, executors or administrators, it is not necessary to join the beneficiaries as parties to the suit. They can be presented by trustees, executors or administrators, as the case may be. The court may, if it thinks fit, order all or any of the beneficiaries as parties.<sup>78</sup>

Where a suit is filed against trustees, executors or administrators, all of them should be joined as parties, except (i) the executors who have not proved the will of the testator; or (ii) trustees, executors or administrators staying outside India.<sup>79</sup>

**(9) Suits by or against minors and lunatics: Order 32**

**(a) Minor: Definition: Rule 1**

A minor is a person who has not attained the age of 18 years. But in the case of a minor of whose person or property a guardian or next friend

75. R. 9.

76. R. 10.

77. *Topanmal v. Kundomal*, AIR 1960 SC 388; see also *infra*, "Execution", Pt. IV.

78. Or. 31 R. 1.

79. R. 2.

has been appointed by a court, or whose property is under the superintendence of a Court of Wards, the age of majority is 21 years.<sup>80</sup>

**(b) Nature and scope**

Order 32 prescribes the procedure of suits to which minors or persons of unsound mind are parties.<sup>81</sup>

**(c) Object**

Order 32 has been specially enacted to protect the interests of minors and persons of unsound mind and to ensure that they are represented in suits or proceedings by persons who are qualified to act as such.<sup>82</sup> An infant is, in law, regarded as of immature intelligence and discretion,<sup>83</sup> and owing to his want of capacity and judgment is disabled from binding himself except where it is for his benefit. The law will, as a general principle, treat all acts of an infant which are for his benefit on the same footing as those of an adult, but will not permit him to do anything prejudicial to his own interests.<sup>84</sup> Thus, a decree passed against a minor or a lunatic without appointment of a guardian is a nullity and void and not merely voidable.<sup>85</sup>

The provisions of Order 32 reflect principles of natural justice, equity and good conscience, inasmuch as they allow litigation to be prosecuted or defended on behalf of minors, persons of unsound mind and persons with mental infirmity. In absence of such provisions interests of persons with legal disability are bound to suffer.<sup>86</sup>

**(d) Suits by minors: Rules 1-2-A**

Every suit by a minor should be instituted in his name through his guardian or next friend.<sup>87</sup> If it is not done, the plaint will be taken off the file.<sup>88</sup> Where such minor is a plaintiff, the Court may, at any stage of the suit, order his guardian or next friend, either on the application of the defendant or suo motu, for reasons to be recorded, to furnish security for costs of the defendant.<sup>89</sup> This provision seeks to discourage vexatious litigation by guardians or next friends of minors.<sup>90</sup>

80. S 3, Majority Act, 1875, Or 32 R 1

81. Or 32 R 15

82. *Ramchandrar Singh v B Gopi Krishna*, AIR 1957 Pat 260 at p 264; *Tulsiram v Shyam Lal Ganpatlal*, AIR 1960 MP 73 at p 74; *Dokku Bhushavva v Katragadda Ramakrishnavva*, AIR 1962 SC 1886 (1963) 2 SCR 499.

83. *Coke's Institutes* at p 291

84. *Halsbury's Laws of England* Vol 17 at p 46.

85. *Ram Chandra v Man Singh*, AIR 1968 SC 954 at p 955 (1968) 2 SCR 572

86. *Mathen Mathai v Kerala SRTC*, AIR 1990 Ker 92

87. R 1

88. R 2

89. R 2-A

90. Statement of Objects and Reasons

**(e) Suits against minors: Rule 3**

Where a suit is instituted against a minor, the court should appoint a guardian *ad litem* to defend the suit. Such appointment should continue throughout all the proceedings including an appeal or revision and in execution of a decree unless it is terminated by retirement, removal or death of such guardian.<sup>91</sup>

**(f) Who may be appointed as guardian or next friend?: Rule 4**

Any person who has attained majority and is of sound mind, may act as a guardian or next friend, provided his interest is not adverse to that of the minor, who is not the opposite party in the suit and who gives consent in writing to act as a guardian or next friend. In the interest of a minor, however, the court may permit another person to act as the next friend or guardian of the minor. In the absence of a fit and willing person to act as a guardian, the court may appoint any of its officers to be such guardian.<sup>92</sup>

**(g) Powers and duties of guardian or next friend: Rules 5-7**

No guardian or a next friend can, without the leave of the court, receive any amount or movable property on behalf of a minor by way of compromise, nor enter into any agreement or compromise on his behalf in the suit. An application for leave of the court should be accompanied by an affidavit of the next friend or guardian, and if the minor is represented by a pleader, with the certificate of the pleader that such compromise is, in his opinion, for the benefit of the minor. Such certificate or opinion expressed in the affidavit, however, cannot preclude the court from examining whether the agreement or compromise proposed is for the benefit of the minor. An agreement or compromise entered into without the leave of the court is voidable at the instance of the minor. Once such an agreement or compromise is avoided by a minor, it has no effect at all.<sup>93</sup>

Rules 6 and 7 provide that no next friend or guardian of a minor for the suit shall, without the leave of the court, (a) receive any money or other movable property on behalf of a minor either by way of compromise before or under a decree or order in favour of the minor, (b) enter into any agreement or compromise on behalf of a minor with reference to the suit, unless such leave is expressly recorded in the proceedings.

The application for such leave must be accompanied by an affidavit of the next friend or guardian of the minor, as the case may be, and if

91. R 3.

92. R 4.

93. Rr. 6, 7; see also *Bishundeo Narain v. Seogeni Rai*, AIR 1951 SC 280; 1951 SCR 548, *Kaushalya Devi v. Bajnath Sayal*, AIR 1961 SC 790 at p. 792; (1961) 3 SCR 769.

the minor is represented by a pleader, by the certificate of the pleader to the effect that such compromise is in his opinion for the benefit of the minor. The opinion so expressed in the affidavit or certificate cannot preclude the court from examining whether in fact the compromise is for the benefit of the minor.

Any compromise entered into without the leave of the court shall be voidable against all parties other than the minor. Therefore, the compromise is good unless the minor chooses to avoid it.<sup>94</sup> But once it is avoided by a minor, it ceases to be effective as regards the other parties also.<sup>95</sup>

Rules 6 and 7 are designed to safeguard the interests of a minor during the pendency of a suit against hostile, negligent or collusive acts of a next friend or guardian.<sup>96</sup> They are based upon the general principle that infant litigants become wards of the court and the court has got the right and also the duty to see that the next friends or guardians act properly and *bona fide* in the interests of minors and that no suits are instituted or carried on by them for their own benefits only irrespective of the benefits of minors.<sup>97</sup>

#### (b) Interest of infants of paramount consideration

The provisions of the Code have been based on the general principle that interest of infants is of paramount consideration. It is, therefore, the duty of the court to ensure that guardians and next friends act honestly and exercise their discretionary powers *bona fide* in the interests of minors.<sup>98</sup>

##### (i) Retirement, removal or death of guardian or next friend: Rules 8-11

A next friend or guardian of a minor cannot retire without first procuring a fit person for substituting him and giving security for the costs already incurred by him.<sup>99</sup>

94. *Bishundeo Narain v. Seogeni Rai*, AIR 1951 SC 280 1951 SCR 548, *Kaushalya Devi v. Baijnath Sayal*, AIR 1961 SC 790 at p. 792. (1961) 3 SCR 769; *Dokku Bhushayya v. Katragadda Ramakrishnayya*, AIR 1962 SC 1886 at p. 1891 (1963) 2 SCR 499, *Rangasavi v. Nagarathnamma*, AIR 1933 Mad 890 at p. 911 (FB), *Dhirendra Kumar v. Sughandhi Bain*, (1989) 1 SCC 85 AIR 1989 SC 147.

95. *Kaushalya Devi v. Baijnath Sayal*, AIR 1961 SC 790.

96. *Dokku Bhushayya v. Katragadda Ramakrishnayya*, AIR 1962 SC 1886 at p. 1891 (1963) 2 SCR 499.

97. *Rangasavi v. Nagarathnamma*, AIR 1933 Mad 890 at p. 911 (FB), *Dhirendra Kumar v. Sughandhi Bain*, (1989) 1 SCC 85 AIR 1989 SC 147.

98. *Bishundeo Narain v. Seogeni Rai*, AIR 1951 SC 280 1951 SCR 548, *Kaushalya Devi v. Baijnath Sayal*, AIR 1961 SC 790 at p. 792. (1961) 3 SCR 769, *Dokku Bhushayya v. Katragadda Ramakrishnayya*, AIR 1962 SC 1886 at p. 1891 (1963) 2 SCR 499, *Rangasavi v. Nagarathnamma*, AIR 1933 Mad 890 at p. 911 (FB), *Dhirendra Kumar v. Sughandhi Bain*, (1989) 1 SCC 85 AIR 1989 SC 147.

99. R. 8.

The court may remove a next friend or guardian of a minor, if it satisfied that (i) his interest is adverse to that of the minor; or (ii) he is so connected with the opposite party that it is unlikely that the interest of the minor will be properly protected by him; or (iii) he does not discharge his duty; or (iv) he ceases to stay in India during the pendency of the suit; or (v) there is any other sufficiently justifiable cause.<sup>100</sup>

Where the guardian or next friend of a minor desires to retire or fails to discharge his duty or where there are other sufficiently justifiable grounds, the court may permit such guardian or next friend to retire or may remove him and may also make such order as to costs as it thinks fit. It should also appoint a new next friend or guardian.<sup>101</sup>

On retirement, removal or death of a guardian or next friend, further proceedings in the suit shall remain stayed until another guardian or next friend is appointed.<sup>102</sup>

#### (j) Decree against minors: Rule 3-A

A decree passed against a minor without appointment of next friend or guardian is null and void. But a decree passed against a minor cannot be said to be illegal nor can be set aside only on the ground that the next friend or a guardian of the minor had an interest in the subject-matter of the suit adverse to that of the minor. If the minor is prejudiced by reason of adverse interest of the next friend or guardian, it can be made a ground for setting aside a decree. The minor may also obtain appropriate relief for misconduct or gross negligence on the part of his next friend or guardian.<sup>103</sup>

#### (k) Minor attaining majority: Rules 12-14

On attaining the age of majority, a minor plaintiff may adopt any of the following courses:

- (i) He may proceed with the suit. In that case he shall apply for an order discharging the next friend or guardian and for leave to proceed in his own name.<sup>104</sup>
- (ii) He may abandon the suit and apply for its dismissal on repayment of costs to the defendant or to his guardian or next friend.<sup>105</sup>
- (iii) He may apply for dismissal of the suit on the ground that it was unreasonable or improper.<sup>106</sup>
- (iv) Where he is a co-plaintiff, he may repudiate the suit and may apply to have his name struck off as co-plaintiff. If the Court

100. R. 9.

101. R. 11.

102. R. 10.

103. R. 3-A, see also *Ram Chandra v. Man Singh*, AIR 1968 SC 954 at p. 955 (1968) 2 SCR 572; *Kameshwari Devi v. Barhani*, (1997) 10 SCC 273.

104. R. 12(1), (2), (3)

105. R. 12(4).

106. R. 14.

finds that he is not a necessary party, it may dismiss him from the suit. But if he is a necessary party, the Court may make him a defendant.<sup>107</sup>

### (I) Persons of unsound mind

The provisions of Order 32 also apply to lunatics and persons of unsound mind.<sup>108</sup>

## (10) Suits concerning family matters: Order 32-A

Order 32-A, as inserted by the Code of Civil Procedure (Amendment) Act, 1976 lays down the procedure where suits or proceedings relate to matters concerning a family.<sup>109</sup>

Ordinary judicial procedure is not ideally suited to the sensitive area of personal relationships. Litigation concerning affairs of the family require special approach keeping in mind serious emotional aspects involved. Family counselling as one of the methods of achieving the ultimate object of preservation of the family, hence, should be kept in the forefront. Proceedings in such suits, therefore, may not always be held in open court but may be conducted *in camera*.<sup>110</sup>

The Supreme Court<sup>111</sup>, while dealing with the Family Courts Act, 1984, observed that the said Act was enacted with a view to promote conciliation in, and secure speedy settlement of, disputes relating to family matters. The said Act was enacted despite the fact that Order 32-A of the Code of Civil Procedure was inserted by reason of the Code of Civil Procedure (Amendment) Act, 1976, which could not bring out desired result.

Every endeavour should be made by the court to assist parties in arriving at an amicable settlement. For that purpose, it is open to the court to secure services of such persons (preferably women where they are available).<sup>112</sup>

## (11) Friendly suits: Section 90, Order 36

### (a) Nature and scope

A "friendly suit" (Special case) is a suit where the parties do not approach a court by presentation of a plaint as is done in ordinary civil

107 R 13

108 R 15, see also *Sharda v Dharmpal*, (2003) 4 SCC 493 AIR 2003 SC 493, *Raj Kumar v Rameshchand*, (1999) 8 SCC 29 AIR 1999 SC 3511

109 Or 32-A Rr 1-6

110 R 2, see also Statement of Objects and Reasons

111 *K A Abdul Jaleel v T A Shahida*, (2003) 4 SCC 166 AIR 2003 SC 2525.

112 Rr 3-5

litigation. They are, however, interested in the decision of any question of fact or of law. For the said purpose, they enter into an agreement in writing stating such question in the form of a case for the purpose of obtaining the opinion of the court. The court may decide the question if it is satisfied that such question is "fit" to be decided.<sup>113</sup>

### (b) Object

In the Statement of Objects and Reasons, it was stated that where parties agree to state a case for the opinion of the court, the court would try and determine such question by registering it as a suit. Upon the judgment so pronounced, a decree will follow. Such decree could be a compromise decree.<sup>114</sup>

### (c) Conditions

The following conditions must be satisfied before a court will hear a friendly suit:<sup>115</sup>

- (1) The agreement is duly executed by the parties;
- (2) The parties have a *bona fide* interest in the question stated; and
- (3) The case is fit to be decided.

### (d) Procedure

Order 32 provides procedure to be followed in friendly suits. Rules 1 and 2 speak of form and contents of an agreement. Such agreement duly entered into between the parties should be filed in the court having jurisdiction to entertain the suit. It shall be registered as a suit and shall be heard and disposed of by a judgment which will be followed by a decree. Thus, virtually, the decree is a consent decree. No appeal lies against such a decree.<sup>116</sup>

The procedure provided by Section 90 and Order 36, however, is rarely invoked because a litigant does not get apparent benefit under it.<sup>117</sup>

### (e) Appeal

A decree passed in a "friendly" suit is in the nature of compromise decree. It is, therefore, not appealable.<sup>118</sup>

113. S. 90; Or. 36 R. 1.

114. *Port of Bombay v. Municipal Corpn. Bombay*, AIR 1930 Bom 232; ILR (1930) 54 Bom 825; *Nilima v. Prakriti Bhushan*, AIR 1982 Cal 12; (1981) 85 CWN 998.

115. Rr 36 R. 1

116. Rr. 2-5

117. Statement of Objects and Reasons.

118. R. 6.

## (12) Interpleader suit: Section 88; Order 35

### (a) Meaning

"To interplead" means "to litigate with each other to settle a point concerning a third party".<sup>119</sup>

In *Halsbury's Laws of England*, it has been stated:<sup>120</sup>

"Where a person is under liability in respect of a debt or in respect of any money, goods or chattels and he is, or expects to be, sued for or in respect of that debt or money, or those goods or chattels, by two or more persons making adverse claims thereto, he may apply to the court for relief by way of interpleader."

### (b) Nature and scope

An interpleader suit is a suit in which the real dispute is not between a plaintiff and a defendant but between the defendants who interplead against each other, unlike in an ordinary suit. In a majority of cases, there is a dispute between a plaintiff and a defendant. In an interpleader suit, the plaintiff is not really interested in the subject-matter of the suit.<sup>121</sup>

Section 88 of the Code enacts that two or more persons claiming adversely to one another the same debt, sum of money or other property, movable or immovable, from a person who does not claim any interest therein except the charges and costs incurred by him and is ready to pay or deliver the same to the rightful claimant, may file an interpleader suit.

### (c) Object

The primary object of filing an interpleader suit is to get claims of rival defendants adjudicated. It is the process wherein the plaintiff calls upon the rival claimants to appear before the court and get their respective claims decided. The decision of the court in an interpleader suit affords indemnity to the plaintiff on payment of money or delivery of property to the person whose claim has been upheld by the court.<sup>122</sup>

119 *Concise Oxford English Dictionary* (2002) at p. 740. *Chamber's 20th Century Dictionary* (1992) at p. 659.

120 *Halsbury's Laws of England* (4th Edn.) Vol. 37 at p. 200, para 264.

121 Mulla, *Code of Civil Procedure* (2011) Vol. III at pp. 3231-32. *Groundnut Extractions Export Development Assn. v. State Bank of India*, (1977) 79 Bom LR 184.

122 *Groundnut Extractions Export Development Assn. v. State Bank of India*, (1977) 79 Bom LR 184, *Sobhanandirao v. Jaggayya*, AIR 1966 AP 92 at p. 95.

**(d) Conditions: Section 88**

Before an interpleader suit can be instituted, the following conditions must be satisfied:

- (i) There must be some debt, sum of money or other property movable or immovable in dispute;
- (ii) Two or more persons must be claiming it adversely to one another;
- (iii) The person from whom such debt, money or property is claimed must not be claiming interest therein other than the charges and costs and he must be ready and willing to pay or deliver it to the rightful claimant; and
- (iv) There must be no suit pending wherein the rights of rival claimants can be properly adjudicated.

**(e) Illustrations**

Let us consider some illustrations to understand the ambit and scope of interpleader suits:

- (1) A is in possession of property claimed by B and C adversely. A does not claim any interest in the property and is ready to deliver it to the rightful owner. A can institute an interpleader suit.
- (2) A, a railway company, is in possession of goods as a consignee. It does not claim any interest in the goods except lien for wharfage, demurrage and freight but rival claims have been made by B and C adversely to each other. A can institute an interpleader suit.
- (3) A is liable to pay Rs 40,000. The amount is claimed by B and C adversely to each other. According to A, he has already paid Rs 10,000. An interpleader suit would be competent for Rs 30,000.
- (4) A is liable to pay Rs 50,000. The said amount is claimed by B and C adversely. A does not dispute his liability and is willing to pay the amount either to B or to C declared to be the rightful claimant by the Court. A may file a suit under this section by making B and C as defendants (Or. 35 R. 1). He can deposit Rs 50,000 in Court (Or. 35 R. 2). On such deposit, the Court may discharge him from liability by awarding costs to him and by removing his name from the suit. (Or. 35 R. 4).
- (5) A holds Rs 50,000 claimed by B and C adversely to each other. A institutes an interpleader suit by joining B and C as defendants. It is revealed that A had a secret agreement with B before the institution of the suit that if B succeeded in the suit, he would accept Rs 40,000 in full and final satisfaction of his claim. In view of the agreement, A has interest in the subject-matter of the suit and he cannot bring an interpleader suit. The suit must be dismissed.

**(f) Who may file interpleader suit?**

A person who has no interest in any debt, sum of money or other property, movable or immovable, except the charges or costs and is ready to pay or deliver the property to the rightful claimant may file an interpleader suit.<sup>123</sup>

**(g) Who cannot file interpleader suit?: Rule 5**

An agent cannot sue his principal, or a tenant or his landlord, for the purpose of compelling them to interplead with persons other than persons claiming through such principals or landlords.<sup>124</sup> The reason for the rule seems to be that ordinarily an agent cannot dispute the title of his principal. Likewise, a tenant cannot dispute the title of his landlord during the subsistence of the tenancy.<sup>125</sup>

**(h) Test**

In order to decide whether a suit is in the nature of an interpleader suit, the court must have regard to all the prayers in the plaint. A suit does not become an interpleader suit merely because the plaintiff requires the defendants to interplead with each other as regards one of the prayers in the plaint.<sup>126</sup>

**(i) Procedure: Order 35 Rules 1-4**

Order 35 lays down the procedure for interpleader suits. In every interpleader suit, in addition to other statements, the plaint also must state (i) that the plaintiff claims no interest in the subject-matter in dispute other than the charges and costs; (ii) the claims have been made by the defendants severally; and (iii) there is no collusion between the plaintiff and any of the defendants.<sup>127</sup>

The court may order the plaintiff to deposit the amount or place the property in the custody of the court and provide costs incurred by him by giving him a charge on the thing claimed.<sup>128</sup>

At the first hearing, the court may declare that the plaintiff is discharged from all liability, award him costs and dismiss him from the suit.<sup>129</sup> On the basis of evidence available, the court may also adjudicate

123 *Robinson v Jenkins* (1890) 24 QB 275 59 LJ QB 147; *G. Hari Karmarkar v J. A. Robson* AIR 1927 Rang 91, *National Insurance Co. Ltd. v. Dhirendra Nath*, AIR 1938 Cal 287.

124 R 5 125 S 116 Evidence Act, 1872.

126 *Jagannath v. Tulka Hera* 11 R (1908) 32 Bom 502 at p. 597; *Vijayan v. Vijayan* 4 De CC&J 183, *National Insurance Co. Ltd. v. Dhirendra Nath*, AIR 1938 Cal 287, *Mariyana Simhappa v. Narala Bala* AIR 1952 Mad 564.

127 Or 35 R 1.

128 R 2 6.

129 R 4.

the title to the thing claimed. Where it is not possible, the court may direct that an issue or issues between the parties be framed and tried, one of the claimants be made a plaintiff in lieu of or in addition to the original plaintiff and the suit shall proceed in an ordinary manner.<sup>130</sup>

### (j) Appeal

An order dismissing the interpleader suit filed by the plaintiff is a "decree". Likewise an adjudication upon the claims of defendants is also appealable as "decree".<sup>131</sup>

A decision under Rules 3, 4 and 6 of Order 35 is an appealable order.<sup>132</sup>

## (13) Suits by indigent persons: Order 33

### (a) Nature and scope

Order 33 provides for filing of suits by indigent persons. It enables persons who are too poor to pay court fees and allows them to institute suits without payment of requisite court fees.

### (b) Object

The provisions of Order 33 are intended to enable indigent persons to institute and prosecute suits without payment of any court fees. Generally, a plaintiff suing in a court of law is bound to pay court fees prescribed under the Court Fees Act *at the time of presentation of plaint*. But a person may be too poor to pay the requisite court fee. This order exempts such person from paying the court fee *at the first instance* and allows him to prosecute his suit *in forma pauperis*, provided he satisfies certain conditions laid down in this order.<sup>133</sup>

Order 33 has been enacted to serve a triple purpose, *viz.*

- (i) to protect bona fide claims of an indigent person;
- (ii) to safeguard interest of revenue; and
- (iii) to protect defendant from harassment.<sup>134</sup>

### (c) Indigent person: Meaning: Order 33 Rule 1

A person is an "indigent person" (i) if he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in

130. Rr 4, 5

131. *R G. Orr v R M M. S T. V E Chidambaram*, ILR (1909) 33 Mad 220; *Maharaj Singh v. Chittarmal*, ILR (1908) 30 All 22: 4 All LJ 683.

132. Or 43 R 1(p).

133. *Lim Pin Sin v. Eng Wan Hock*, AIR 1928 Rang 306; *Sumathykutti Amma v Narayani Panikkathy*, AIR 1973 Ker 19 at p. 20, *Gehru v. Charan Das Dogra*, AIR 1982 HP 23 ILR 1981 HP 307.

134. *Venkatashubbaiah v. Thirupathiah*, AIR 1955 AP 165. 1955 ALT 198.

such suit; or (ii) where no such fee is prescribed, when he is not entitled to property worth one thousand rupees. In both the cases, the property exempt from attachment in execution of a decree and the subject-matter of the suit should be excluded.<sup>135</sup>

Any property acquired by the applicant after the presentation of the application for permission to sue as an indigent person and the decisions thereon should also be taken into consideration for deciding the question whether the applicant is an indigent person.<sup>136</sup>

The word "person" includes juristic person.<sup>137</sup>

#### (d) Contents of application: Rule 2

Every application for permission to sue as an indigent person should contain the following particulars:

- (1) The particulars required in regard to plaints in suits;
- (2) A schedule of any movable or immovable property belonging to the applicant with the estimated value thereof; and
- (3) Signature and verification as provided in Order 6 Rules 14 and 15.<sup>138</sup>

The application should be presented by the applicant to the court in person unless exempted by the court.<sup>139</sup> Where there are two or more plaintiffs, it can be presented by any of them.<sup>140</sup> The suit commences from the moment an application to sue in *forma pauperis* is presented.<sup>141</sup>

#### (e) Rejection of application: Rule 5

The court will reject an application for permission to sue as an indigent person in the following cases:<sup>142</sup>

- (i) Where the application is not framed and presented in the prescribed manner; or
- (ii) Where the applicant is not an indigent person; or
- (iii) Where the applicant has, within two months before the presentation of the application, disposed of any property fraudulently or in order to get permission to sue as an indigent person; or
- (iv) Where there is no cause of action; or

135 Expln I to R 1, Or 33

136 Expln II to R 1, *supra*

137 *Union Bank of India v Khader International Construction*, (2001) 5 SCC 22

138 R 2

139 R 3. See also *Dipo v Wassan Singh*, (1983) 3 SCC 376 AIR 1983 SC 846

140 Proviso to R 3

141 *Vijay Pratap v Dukh Haran Nath*, AIR 1962 SC 941 1962 Supp (2) SCR 675, *Jugal Kishore v Dhannu Devi* (1973) 2 SCC 567 AIR 1973 SC 2508

142 R 5, see also *M L Sethi v R P Kapur* (1972) 2 SCC 427 AIR 1972 SC 2379

- (v) Where the applicant has entered into an agreement with reference to the subject-matter of the suit under which another person has obtained interest; or
- (vi) Where the suit appears to be barred by law; or
- (vii) Where any other person has entered into an agreement with the applicant to finance costs of the litigation.

**(f) Inquiry: Rule 1-A**

In the first instance, an inquiry into the means of the applicant should be made by the Chief Ministerial Officer of the court. The court may adopt the report submitted by such officer or may itself make an inquiry.<sup>143</sup>

Where the application submitted by the applicant is in proper form and is duly represented, the court may examine the applicant regarding the merits of the claim and the property of the applicant.<sup>144</sup>

The court shall then issue notice to the opposite party and to the Government Pleader and fix a day for receiving evidence as the applicant may adduce in proof of his indigency or in disproof thereof by the opposite party or by the Government Pleader. On the day fixed, the court shall examine the witnesses (if any), produced by either party, hear their arguments and either allow or reject the application.<sup>145</sup>

**(g) Where permission is granted: Rules 8-9-A**

Where an application to sue as a indigent person is granted, it shall be deemed to be a plaint in the suit and shall proceed in the ordinary manner, except that the plaintiff will not have to pay court fees or process fees.

The court may assign a pleader to an indigent person if he is not represented by a pleader. The Central Government or the State Government may make provisions for rendering free legal aid and services to indigent persons to prosecute their cases. A defendant can also plead set-off or counterclaim as an indigent person.<sup>146</sup>

**(h) Where permission is rejected: Rules 15-15-A**

Where the court rejects an application to sue as an indigent person, it will grant time to the applicant to pay court fees.<sup>147</sup> An order refusing to allow an applicant to sue as an indigent person shall be a bar to a subsequent similar application. However, this does not debar him

143. R. 1-A.

144. R. 4.

145. Rr 6, 7.

146. Rr. 8, 9-A, 18, Art. 39-A, Constitution of India, Ss. 12, 13 Legal Services Authorities Act, 1987, see also *Sugreev v. Sushila Bai*, AIR 2003 Raj 149.

147. R. 15-A.

from suing in an ordinary manner, provided he pays the costs incurred by the Government Pleader and the opposite party in opposing the application.<sup>148</sup>

**(i) Revocation of permission: Rule 9**

The Court may, on an application by the defendant or by the Government Pleader, revoke permission granted to the plaintiff to sue as an indigent person in the following cases:<sup>149</sup>

- (i) Where he is guilty of vexatious or improper conduct in the course of the suit; or
- (ii) Where his means are such that he ought not to continue to sue as an indigent person; or
- (iii) Where he has entered into an agreement under which another person has obtained an interest in the subject-matter of the suit.

**(j) Costs**

The costs of an application to sue as an indigent person shall be the costs in the suit.<sup>150</sup>

**(k) Recovery of court fees and costs**

(A) *Where indigent person succeeds.*—Where the plaintiff (indigent person) succeeds in the suit, the court shall calculate the amount of court fees and costs and recover from the party as ordered by the court.<sup>151</sup>

(B) *Where indigent person fails.*—Where the plaintiff (indigent person) fails or the suit abates, the court shall order him (plaintiff) to pay court fees and costs.<sup>152</sup>

**(l) Right of State Government**

The State Government has right to recover court fees. For that purpose, it is deemed to be a party to the suit.<sup>153</sup>

**(m) Realization of court fees: Rule 14**

Where an indigent person succeeds in a suit, the State Government can recover court fees from the party as per the direction in the decree and it will be the first charge on the subject-matter of the suit. Where an indigent person fails in the suit, the court fees shall be paid by him

148 R 15

149 R 9

150 R 16.

151 R 10

152 Rr 11 11-A

153 Rr 12 13

Where the suit abates on account of the death of a plaintiff, such court fees would be recovered from the estate of the deceased plaintiff.<sup>154</sup>

**(n) Set-off or counter claim**

An indigent person may also plead set-off or file counter claim without paying court fees.<sup>155</sup>

**(o) Appeal**

An order rejecting an application to sue as an indigent person is appealable.<sup>156</sup>

**(p) Appeals by indigent persons: Order 44**

A person unable to pay court fees on memorandum of appeal may apply to allow him to appeal as an indigent person. The necessary inquiry as prescribed in Order 33 will be made before granting or refusing the prayer.<sup>157</sup> But where the appellant was allowed to sue as an indigent person in the trial court, no fresh inquiry will be necessary if he files an affidavit that he continues to be an indigent person.<sup>158</sup>

**(14) Suits relating to constitutional validity of statutory instruments: Order 27-A**

Order 27-A provides that in a suit or appeal in which a substantial question of law as to the interpretation of the Constitution, as referred to in Article 132(1) or 147 of the Constitution of India, is involved, the Court shall not proceed to determine the question until after notice to the Attorney General of India if the question of law concerns the Central Government and to the Advocate General of the State if the question of law concerns the State Government.<sup>159</sup>

If such officers apply, they may be made party to the suit or appeal.<sup>160</sup> In such a case, the Attorney General or the Advocate General shall not be entitled to or liable for costs.<sup>161</sup> Rules 1-A and 2-A as added by the Amendment Act of 1976 prescribe the procedure in suits or appeals involving the validity of any statutory instrument.

154. R. 14.

155. R. 117.

156. Or 43, R. 1 (na).

157. Or 44, R. 1.

158. Or 44, R. 3.

159. Or. 27-A Rr. 1, 4; see also *United Provinces v. Atiqah Begum*, AIR 1941 FC 16. 1940 FCR 110; *State of Gujarat v. Kasturchand*, 1991 Supp (2) SCC 345. AIR 1991 SC 695

160. R. 2.

161. R. 3.

## (15) Mortgage suits: Order 34

### (a) Nature and scope

Order 34 lays down procedure with regard to suits relating to mortgages of immovable property. It provides for the frame of the suit relating to sale, foreclosure and redemption of mortgaged property and also to enforce charges. The procedure laid down in Order 34 is distinct and different for execution of decrees in mortgage suits than the procedure prescribed in Order 21 for execution of decrees passed in other suits.<sup>162</sup>

### (b) Mortgage: Definition

Mortgage is defined in the following words:

"A mortgage is the transfer of interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage money and the instrument (if any) by which the transfer is effected is called a mortgage-deed."<sup>163</sup>

### (c) Essentials

From the above definition, it becomes clear that there are always two parties to a mortgage transaction: (i) mortgagor; and (ii) mortgagee. The mortgagor has a right to redeem his property from the mortgage encumbrance while the mortgagee has the right to sell the mortgaged property and the right to foreclose by depriving the mortgagor of his right of redemption.

### (d) Object

The provisions of Order 34 have been enacted with the avowed object of avoiding multiplicity of suits by deciding all claims in the presence of the interested parties.

### (e) Parties: Rule 1

Rule 1 of Order 34 enacts that all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any such suit relating to mortgage.<sup>164</sup>

162 S. *Sivaprakasam v B V Munira* (1997) 9 SCC 636

163 S. 58(a) Transfer of Property Act 1882

164 Or 34 R. 1, see also *Unhagamai v Patel Narandas*, (1982) 1 SCC 223 AIR 1982 SC 121

The object underlying joinder of parties in mortgage suits is to avoid multiplicity of proceedings and to ensure that all the claims effecting the mortgage security or the right of redemption may be disposed of in the same suit.

This provision is, however, subject to the provisions of the Code; and Order 1 Rule 9 lays down that no suit shall be defeated by reason of non-joinder of parties.<sup>165</sup>

(f) Suit for foreclosure: Rules 2-3

(i) *Preliminary decree.*—In suit for foreclosure, if the plaintiff succeeds, the court shall pass a preliminary decree (a) ordering that an account be taken of what was due to the plaintiff at the date of such decree for principal and interest on the mortgage, the costs of the suit awarded to him; and other costs, charges and expenses properly incurred by him; or (b) declaring the amount so due; and (c) directing that if the defendant pays into court the said amount, on or before such date fixed or extended by the court, the plaintiff shall deliver to the defendant all documents relating to the mortgaged property and retransfer the property to the defendant free from the mortgage and all encumbrances created by the plaintiff and put the defendant in possession thereof.

If the payment is not made by the defendant, the plaintiff shall be entitled to apply for a final decree debarring the defendant from his right to redeem the mortgage.<sup>166</sup>

(ii) *Final decree.*—Where the defendant makes payment of all amounts on or before the date fixed or extended by the court for such payment, the court shall, on an application being made by him, pass a final decree directing the plaintiff to deliver to the defendant all the documents referred to in the preliminary decree, to retransfer the property and to put the defendant in possession thereof.

Where no payment has been made by the defendant on or before the date fixed or extended by the court for such payment, the court shall on application being made by the plaintiff pass a final decree declaring that the defendant is debarred of his right to redeem the mortgage and, if necessary, by directing the defendant to put the plaintiff in possession of the mortgaged property. On passing of a final decree, the defendant shall be deemed to have been discharged from all his liabilities in respect of the mortgage.<sup>167</sup>

165. *Ibid*; see also *supra*, Chap. 5; *N K Mohd. Sulaiman v. N C Mohd. Ismail*, AIR 1966 SC 792: (1966) 1 SCR 937.

166. Or. 34 R. 2.

167. R. 3

**(g) Suit for sale: Rules 4-6**

(i) *Preliminary decree.*—In a suit for sale, if the plaintiff succeeds, the court shall pass a preliminary decree in the aforesaid manner. In case of default by the defendant, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property be sold and the sale proceeds be applied in payment of amount due to the plaintiff be.<sup>168</sup>

(ii) *Final decree.*—Where on or before the day fixed or at any time before the confirmation of sale, the defendant makes payment into court all amounts due, the court shall on application being made by him pass a final decree directing the plaintiff to deliver to the defendant all the documents referred to in the preliminary decree, to retransfer the mortgaged property and to put the defendant in possession thereof.

Where the payment has not been made by the defendant, the court shall, on an application being made by the plaintiff pass a final decree directing sale of mortgaged property.<sup>169</sup>

If the net proceeds of such sale are less than the amount due, the court may pass a decree for the balance if it is legally recoverable from the defendant.<sup>170</sup>

**(h) Suit for redemption: Rules 7-9**

(i) *Preliminary decree.*—In a suit for redemption, if the plaintiff succeeds, the court shall pass a preliminary decree in the aforesaid manner. If the plaintiff does not make the payment, the defendant shall be entitled to apply for a final decree that the mortgaged property be sold or that the plaintiff be debarred of his right to redeem the mortgaged property, depending upon the nature of the mortgage.<sup>171</sup>

(ii) *Final decree.*—Where before a final decree debarring the plaintiff of his right to redeem the mortgage has been passed or before the confirmation of a sale, the plaintiff pays all amounts due, the court shall, on application being made by him pass a final decree directing the defendant to deliver to the plaintiff all the documents referred to in the preliminary decree, to retransfer the mortgaged property and to put the plaintiff in possession thereof.

If the net proceeds of such sale are less than the amount due, the court may pass a decree for the balance if it is legally recoverable from the plaintiff.<sup>173</sup> If it appears that nothing is due to the defendant or that he has been overpaid, the court shall pass a decree directing him to retransfer the property and to pay to the plaintiff the amount which may be found due to him and he may be put in possession of the mortgaged property.<sup>174</sup>

The Code also makes provisions for payment of costs, mesne profits and interest in mortgage suits.<sup>175</sup>

## (16) Summary suits: Order 37

### (a) Nature and scope

Order 37 provides summary procedure in suits based on negotiable instruments or where the plaintiff seeks to recover debt or liquidated amount. The essence of summary suits is that the defendant is not, as in an ordinary suit, entitled as of right to defend the suit. He must apply for leave to defend within the stipulated period of ten days. Such leave will be granted only if the affidavit filed by the defendant discloses such facts as will make it incumbent upon the plaintiff to prove consideration or such other facts as the court may deem sufficient.<sup>176</sup> The provisions of Order 37 are merely rules of procedure. They do not alter the nature of the suit or jurisdiction of courts.<sup>177</sup>

The provisions of Order 37 are constitutional.<sup>178</sup>

### (b) Object

The object underlying the summary procedure is to prevent unreasonable obstruction by the defendant who has no defence and to assist expeditious disposal of cases.<sup>179</sup>

Trading and commercial operations will be seriously impeded if money disputes between the parties are not adjudicated upon immediately.<sup>180</sup>

Taken by and large, the object of the provision is to ensure that the defendant does not unnecessarily prolong the litigation and prevent the plaintiff from obtaining a decree by raising untenable and frivolous

173. R. 8-A.

174. R. 9.

175. Rr. 10, 10-A, 11.

176. Or. 37 Rr. 1-3.

177. *Prayag Deb v. Rama Roy*, AIR 1977 Cal 1 (FB).

178. *Ambalal Pumsottamdas v. Jawarial Purusottam Dave*, AIR 1953 Cal 758; ILR (1955) 1 Cal 441

179. *Milkhiram India (P) Ltd. v. Chamanlal Bros.*, AIR 1965 SC 1698 (1966) 68 Bom LR 36, *V.K. Enterprises v. Shiva Steels*, (2010) 9 SCC 256; AIR 2010 SC 2885.

180. *Ibid.*

defences in a class of cases where speedy decisions are desirable in the interests of commercial transactions.<sup>181</sup>

### (c) Discretionary power

The discretionary power conferred upon the court under Order 37 should be exercised judicially, judiciously and on well-settled principles of natural justice. Wherever defence raises a "triable issue", leave should be granted unconditionally. If it is not done, leave may become illusory.<sup>182</sup>

Care should be taken to see that the object of the rule to assist the expeditious disposal of commercial causes should not be defeated. But it also must be ensured that real and genuine triable issues are not shut out by unduly severe orders as to deposit.<sup>183</sup>

### (d) Extent and applicability

The provisions of Order 37 apply to High Courts, City Civil Courts, Courts of Small Causes and other superior courts. They apply to (a) suits based upon bills of exchange, *hundies* and promissory notes; and (b) suits in which the plaintiff seeks to recover a debt or liquidated amount payable by the defendant with or without interest arising (i) on a written contract; or (ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or debt other than penalty; or (iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated amount.<sup>184</sup>

### (e) Procedure

Rules 2 and 3 provide the procedure of summary suits. Rule 2 provides that after the summons of the suit has been issued to the defendant, the defendant must appear and the plaintiff will serve a summons for judgment on the defendant. The defendant is not entitled to defend a summary suit unless he enters an appearance. In default of this, the plaintiff will be entitled to a decree which will be executed forthwith.

Rule 3 prescribes the mode of service of summons and leave to defend. The defendant must apply for leave to defend within ten days

181 *Ibid*, see also *Santosh Kumar v Bhai Mool Singh*, AIR 1958 SC 321, 1958 SCR 1211.

182. *Santosh Kumar v Bhai Mool Singh*, AIR 1958 SC 321, *Milkhiram India (P) Ltd v Chamanlal Bros*, AIR 1965 SC 1698, *Larsen & Toubro Ltd v Arun Kumar Mansingka*, 2000 AIR SCW 4933.

183 *Ibid*, see also *Kamlesh Kohli v Escotrac Finance & Investment Ltd*, (2000) 1 SCC 324, *Mechelec Engineers & Manufacturers v Basic Equipment Corpn*, (1976) 4 SCC 687, AIR 1977 SC 577.

184 Rr 17, see also *Prayag Deb v Rama Roy*, AIR 1977 Cal 1.

from the date of service of summons upon him and such leave will be granted only if the affidavit filed by the defendant discloses such facts as may be deemed sufficient to entitle him to defend. Such leave may be granted to the defendant unconditionally or upon such terms as may appear to the court or judge to be just.<sup>185</sup>

Leave to defend, however, should not be refused unless the court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put by him is frivolous or vexatious. If a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend should not be granted unless such admitted amount is deposited by him in the court.<sup>186</sup>

At the hearing of such summons for judgment, if the defendant does not apply for leave to defend or such leave is refused, the plaintiff is entitled to a decree forthwith. The court or judge may, for sufficient cause shown by the defendant, excuse the delay of the defendant in entering an appearance or in applying for leave to defend the suit. No hard and fast rule can be laid down as to in what cases leave to defend can be granted. Each case must be decided on its own facts and circumstances and the discretion must be exercised judicially and in consonance with the principles of natural justice which form the foundations of our laws.<sup>187</sup>

#### (f) Test

The test whether leave to defend should be granted or not is to see whether the defence raises a real, honest and *bona fide* dispute and raises a triable issue or not. If the court is satisfied that the defence has raised a triable issue or a fair dispute has arisen, leave to defend should not be refused.<sup>188</sup> Again, it is hazardous and unfair to pronounce a categorical opinion on such matter before the evidence is taken. It is only in cases where the defence is patently dishonest or so unreasonable that it could not reasonably be expected to succeed that the exercise of discretion to grant unconditional leave can be refused.<sup>189</sup>

As the matter is in the discretion of the court, no hard and fast rule can be laid down as to when the discretion should be exercised by granting unconditional leave to the defendant. In general, the test is to

185. *Mechelec Engineers & Manufacturers v. Basic Equipment Corpn.*, (1976) 4 SCC 687 AIR 1977 SC 577.

186. *Ibid*; see also *supra*, "discretionary power".

187. *Ibid*; see also *Santosh Kumar v. Bhai Mool Singh*, AIR 1958 SC 321; 1958 SCR 1211.

188. *Raj Duggal v. Ramesh Kumar*, 1991 Supp (1) SCC 191. AIR 1990 SC 2218; *V K Enterprises v. Shiva Steels*, (2010) 9 SCC 256. AIR 2010 SC 2885.

189. *Mechelec Engineers & Manufacturers v. Basic Equipment Corpn.*, (1976) 4 SCC 687, at pp. 690; AIR 1977 SC 577, at p. 580.

see whether the defence raises a real issue and not a sham one, in the sense that, if the facts alleged by the defendant are established, there would be a good or even plausible, defence on those facts.<sup>190</sup>

Under special circumstances, the court can set aside the decree and stay the execution and may grant leave to the defendant to appear and defend the suit.<sup>191</sup> However, inherent power under Section 151 of the Code cannot be exercised for setting aside such decree.<sup>192</sup>

### (g) Difference between summary suit and ordinary suit

Whereas in an ordinary suit the defendant is entitled to defend the suit as of right, in a summary suit he is not so entitled except with the leave of the court.<sup>193</sup> While in an ordinary suit the decree cannot be set aside by the trial court except on review, in a summary suit the trial court may set it aside under special circumstances.<sup>194</sup>

### (h) Recording of reasons

Generally, a court while granting conditional leave, should record reasons. Absence to record reasons, however, will not make the order invalid.<sup>195</sup>

### (i) Appeal

No appeal lies against an order granting or refusing leave to defend under Rule 3. But where a decree is passed in a summary suit, an appeal lies.

### (j) Revision

An order passed under Order 37 is a "case decided" under Section 115 of the Code and is revisable though a High Court generally does not interfere with the discretion exercised by the trial court.<sup>196</sup>

190. *Santosh Kumar v Bhai Mool Singh*, AIR 1958 SC 321 1958 SCR 1211

191 R 4

192 *Ramkarandas v Bhagwandas*, AIR 1965 SC 1144 at p. 1145 (1965) 2 SCR 186

193 R 3

194 R 4

195 *V Kamalanathan v E I D Parry Ltd*, (1978) 1 MLJ 25 AIR 1978 NOC 271, *Fateh Lal v Sinder Lal*, AIR 1980 Raj 220 *Vijaykumar K Shah v Firm of Pari Naresh Chandra* AIR 1968 Guj 247, *Bombay Enamel Works v Purshottam*, AIR 1975 Bom 128 *Mulkharam India (P) Ltd v Chamanlal Bros*, AIR 1965 SC 1698 *Ashok Umraomal Sancheti v Rispalchand*, (2000) 9 SCC 737

196 *Mecnetec Engineers v Basic Equipment Corpn*, (1976) 4 SCC 687 AIR 1977 SC 577

(k) Writ

In appropriate cases, a High Court may interfere with an order passed granting or refusing leave under Rule 3.<sup>197</sup>

(l) Principles

In *Kiranmoyee Dassi v. J. Chatterjee*<sup>198</sup>, the High Court of Calcutta—laid down the following principles relating to suits of a summary nature:

- (i) If the defendant satisfies the court that he has a good defence to the claim on its merits, the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.
- (ii) If the defendant raises a triable issue indicating that he has a fair or *bona fide* or reasonable defence although not a positively good defence, the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.
- (iii) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiffs claim, the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but, in such a case, the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.
- (iv) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.
- (v) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence.<sup>199</sup>

197. *Santosh Kumar v Bhai Mool Singh*, AIR 1958 SC 321, 1958 SCR 1211; *Dwarka Prasad Agarwal v B D Agarwal*, (2003) 6 SCC 230, *India Thermal Power Ltd v State of M P*, (2000) 3 SCC 379.

198. AIR 1949 Cal 479 (1944) 49 CWN 246 ILR (1945) 2 Cal 145

199. *Ibid*, at p. 486 (AIR) at p. 253 (CWN), approved in *Mechelec Engineers & Manufacturers v. Basic Equipment Corpn.*, (1976) 4 SCC 687, *Sunil Enterprises v State Bank of India*, (1998) 5 SCC 354

## (17) Suits relating to public nuisance: Section 91

### (a) Nature and scope

Section 91 of the Code provides for filing of a suit in the case of public nuisance or other wrongful acts affecting the public at large. It states that such a suit can be instituted for declaration, injunction or such other relief which may be appropriate in the circumstances of the case.

### (b) Object

Ratanlal and Dhirajlal stated, "Though not so dangerous as occasion for keeping the peace or good behaviour, nor so urgent as unlawful assemblies, they (nuisances) are yet sufficiently fraught with potential danger as to warrant a summary action on the part of the majistry."<sup>200</sup>

In the leading case of *Municipal Council, Ratlam v. Vardichan*<sup>201</sup>, the Supreme Court observed that a public nuisance is a challenge to the social justice component of the Rule of Law. In case of public nuisance it is the power coupled with duty of the Government or local authority to take appropriate steps to remove it.

### (c) Public nuisance: Meaning

The expression "public nuisance" has not been defined in the Code. It can, however, be said to be an act or omission which causes common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury, obstruction, danger or annoyance to the persons who may have occasion to use public rights.<sup>202</sup>

Thus, obstruction of a public highway, pollution of public waterways, storage of inflammable materials, endangering life, health or property of public, ringing of bell day and night, etc. are instances of public nuisances.

### (d) Who may sue?

Any of the following persons may bring a suit in relation to public nuisance or other wrongful acts:

- (i) Advocate General,<sup>203</sup>
- (ii) Two or more persons with the leave of the court<sup>204</sup>
- (iii) Any private person if he has sustained special damage.<sup>205</sup>

200 Ratanlal & Dhirajlal, *Code of Criminal Procedure*, 2006 at p. 191.

201 (1980) 4 SCC 162 at p. 171. AIR 1980 SC 1622 at p. 1628, see also, Law Commission's Fifty-fourth Report at pp. 10-11.

202 S. 268 IPC.

203 S. 91(1)(a), CPC.

204 S. 91(1)(b) CPC.

205 S. 91(2) CPC.

(e) Remedies

The following remedies are available against public nuisance:

- (1) A person committing a public nuisance may be punished under the Indian Penal Code;<sup>206</sup>
- (2) Magistrates may remove public nuisance in certain circumstances by exercising summary powers;<sup>207</sup>
- (3) A suit can be instituted for declaration, injunction or other appropriate relief without proof of special damage;<sup>208</sup> and
- (4) A suit may also be filed by a private individual, where he has suffered special damage.<sup>209</sup>

(f) Appeal

An appeal lies against an order refusing to grant leave to file a suit for public nuisance or other wrongful acts affecting public.<sup>210</sup>

(18) Suits relating to public trusts: Section 92

(a) Nature and scope

Section 92 of the Code provides for filing of a suit in respect of breach of trust created for public purposes of a charitable or religious nature by the Advocate General or two or more persons having an interest in the trust with the leave of the Court for reliefs specified therein.

(b) Extent and applicability

A suit under Section 92 of the Code is of a special nature for the protection of public rights in public trusts and charities. Such a suit is basically on behalf of all persons interested in the trust. The beneficiaries choose two or more persons for filing the suit and that is how their names are shown as plaintiffs. But the plaintiffs are merely representatives of all the beneficiaries and the action is instituted on behalf of all. The suit is thus a representative suit and a decision in such suit would also attract the doctrine of *res judicata*.<sup>211</sup>

206. S. 290, IPC.

207. Ss. 133-43, CrPC.

208. S. 90(1), CrPC

209. S. 91(1), CPC

210. S. 104(fa), CPC.

211. *R. Venugopala v. Venkatarayulu Naidu Charities*, 1989 Supp (2) SCC 356; AIR 1990 SC 444; *Ahmad Adam Sait v. M E. Makhri*, AIR 1964 SC 107. (1964) 2 SCR 647, *Raje Anandrao v. Shamrao*, AIR 1961 SC 1206; (1961) 3 SCR 930.

### (c) Object

The main object of this provision is to afford protection to public trusts of a charitable or religious nature from being subjected to harassment by suits being filed against them<sup>212</sup> and to prevent multifarious and vexatious suits being filed by irresponsible persons against the trustees whose duty is to administer such trusts.<sup>213</sup>

Before the Advocate General files a suit or before the court grants leave for filing a suit under Section 92, *prima facie* satisfaction regarding breach of trust or of the necessity for obtaining directions of the court must be there.<sup>214</sup>

### (d) Conditions

Before an action can be taken under this section, the following conditions must be fulfilled:<sup>215</sup>

- (1) The trust must have been created for public purposes of a charitable or religious nature;
- (2) There must be a breach of trust or direction of the court must be necessary in the administration of such a trust; and
- (3) The relief claimed must be one or the other of the reliefs specified in Section 92.

If any of the three conditions is not satisfied, the suit falls outside the scope of the said section.<sup>216</sup>

### (e) Section whether mandatory

The provisions are mandatory and must be complied with. Where the conditions laid down in the section have not been fulfilled, no suit can

212. *Madappa v. M N. Mahanthadevaru*, AIR 1966 SC 878 at p. 881 (1966) 2 SCR 151, *Swami Paramatmanand v. Ramji Tripathi*, (1974) 2 SCC 695 at p. 699 AIR 1974 SC 2141 at p. 2144; *R M. Narayana Chettiar v. N. Lakshmanan Chettiar*, (1991) 1 SCC 48 AIR 1991 SC 221; *Vidyodaya Trust v. Mohan Prasad*, (2008) 4 SCC 115 AIR 2008 SC 1633, see also, Statement of Objects and Reasons, Gazette of India, Pt. II, S. 2, Extra., dated 8-4-1974 at p. 306

213. *Narendrasingji Ranjitsingji v. Udesinghji*, AIR 1947 Bom 451 at p. 460 (1947) 49 Bom LR 318.

214. *Madappa v. M N. Mahanthadevaru*, AIR 1966 SC 878

215. *Bishwanath v. Thakur Radha Ballabhji*, AIR 1967 SC 1044 (1967) 2 SCR 618, *Sugra Bibi v. Hazri Kummur*, AIR 1969 SC 884 (1969) 3 SCR 83, *Harendra Nath v. Kaliram Das*, (1972) 1 SCC 115 AIR 1972 SC 246 at p. 250, *Pragdasji v. Ishwarlalbhai*, AIR 1952 SC 143 at p. 144, *Swami Paramatmanand v. Ramji Tripathi*, (1974) 2 SCC 695, *Kintali China Jagannadham v. K. Laxmi Naidu*, AIR 1988 Ori 100 (1987) 64 Cut LT 493

216. *Bishwanath Thakur Radha Ballabhji*, AIR 1967 SC 1044 (1967) 2 SCR 618

be instituted. The defect is basic and fundamental and goes to the root of the matter.<sup>217</sup>

(f) Who may sue?

A suit under Section 92 may be filed:

- (i) by the Advocate General in Presidency Towns and outside Presidency Towns by the Collector or such officer as the State Government may appoint on that behalf; or
- (ii) by two or more persons having an interest in the trust and who have obtained the leave of the court.<sup>218</sup>

(g) Who may be sued?

A suit may be brought against the persons in possession of trust property who claim adversely to the trust or against trustees who have committed breach of trust.<sup>219</sup>

(h) Notice

Considering the object underlying Section 92 of the Code, the court should normally issue a notice to the defendants before granting leave to file a suit. The defendants may satisfy the court that the allegations made in the plaint are false and frivolous, or the persons who have applied for leave want to harass the trust. But if the suit is filed without notice to the defendants, it would not be bad and non-maintainable.<sup>220</sup>

(i) Relief

A suit may be instituted for any one or more of the following reliefs:<sup>221</sup>

217. *R.M. Narayana Chettiar v. N. Lakshmanan Chettiar*, (1991) 1 SCC 48; AIR 1991 SC 221; *P.V. Mathew v. K.V. Thomas*, AIR 1983 Ker 5; 1982 Ker LT 493, *Kintali China Jaganadham v. K. Laxmi Naidu*, AIR 1988 Ori 100; (1987) 64 Cut LT 493; *Narain Lal v. Sunderlal Tholia*, AIR 1967 SC 1540, *Swami Paramatmanand v. Ramji Tripathi*, (1974) 2 SCC 695; AIR 1974 SC 2141.

218. Ss. 92-93, CPC.

219. *Syed Mohd. Salie Labbai v. Mohd. Hanifa*, (1976) 4 SCC 780 at pp. 813-14; AIR 1976 SC 1569 at p. 1598; *Venkatanarasimha v. Subba Rao*, AIR 1923 Mad 376; *Perla v. Collector of Vizag*, AIR 1953 Mad 908; *Anjuman Isamila v. Latapat Ali*, AIR 1950 All 109; *Satya Charan v. Rudranand*, AIR 1953 Cal 716.

220. *R.M. Narayana Chettiar v. N. Lakshmanan Chettiar*, (1991) 1 SCC 48. AIR 1991 SC 221.

221. S. 92(1), CPC, 1908; see also *Pragdasji v. Ishwarlalbhai*, AIR 1952 SC 143 at p. 144; 1952 SCR 513; *Bishwanath v. Thakur Radha Ballabhli*, AIR 1967 SC 1044. (1967) 2 SCR 618; *Sugra Bibi v. Hazi Kummur*, AIR 1969 SC 884; (1969) 3 SCR 83; *Harendra Nath v. Kaliram Das*, (1972) 1 SCC 115; AIR 1972 SC 246; *Charan Singh v. Darshan Singh*, (1975) 1 SCC 298; AIR 1975 SC 371, *Syed Mohd. Salie Labbai v. Mohd. Hanifa*, (1976) 4 SCC

- (i) removing any trustee;
- (ii) appointing a new trustee;
- (iii) vesting any property in a trustee;
- (iv) directing a trustee who has been removed or a person who has ceased to be a trustee, to deliver possession of any trust property in his possession to the person entitled to the possession of such property;
- (v) directing accounts and inquiries;
- (vi) declaring what proportion of the trust property or of the interest therein shall be allotted to any particular object of the trust;
- (vii) authorising the whole or any part of the trust property to be let, mortgaged or exchanged;
- (viii) settling a scheme;
- (ix) granting such further or other relief as the nature of the case may require.

If the suit is not for any of the above reliefs, it is not maintainable and should be dismissed.<sup>222</sup>

#### (j) Appeal

An appeal lies against an order refusing leave to file a suit for breach of trust.<sup>223</sup>

#### (k) Doctrine of cy-pres

(i) *Meaning*.—Cy-pres means “as nearly as possible to the testator’s or donor’s intentions when these cannot be precisely followed”.<sup>224</sup>

(ii) *Doctrine explained*.—Where there is a gift or trust for a charity which can be substantially, but not literally, fulfilled, it will be effectuated by moulding it so that as nearly as practicable the intention of the benefactor may be carried out. The doctrine of cy-pres, thus, makes possible the application of funds to purposes as nearly as possible to those selected by the donor.<sup>225</sup>

In *Ratilal v. State of Bombay*<sup>226</sup>, the Supreme Court explained the doctrine thus:

780 at p. 813-14 AIR 1976 SC 1569 at p. 1598, *Sarat K. Mitra v. Hem Ch. Dev.* AIR 1960 Cal 558 at p. 559

222 *Pragdasji v. Ishwarlalbhai*, AIR 1952 SC 143 1952 SCR 513, *Harendra Nath v. Kaliram Das*, (1972) 1 SCC 115 AIR 1972 SC 246

223 S 104 (Hd)

224 *Concise Oxford English Dictionary* (2007) at p. 357, *Stroud’s Judicial Dictionary* (5th Edn) Vol. I at p. 612, *Halshury’s Modern Equity* (11th Edn) at p. 509

225 *Ibid.*, see also *Ratilal v. State of Bombay*, AIR 1954 SC 388

226. AIR 1954 SC 388 1954 SCR 1055

"When the particular purpose for which a charitable trust is created fails or by reason of certain circumstances the trust cannot be carried into effect either in whole or in part, or where there is a surplus left after exhausting the purposes specified by the settlor, the court would not, when there is a general charitable intention expressed by the settlor, allow the trust to fail but would execute it cy-pres, that is to say, in some way as nearly as possible to that which the author of the trust intended. In such cases, it cannot be disputed that the court can frame a scheme and give suitable directions regarding the objects upon which the trust money can be spent."<sup>227</sup>

(iii) *Recommendation of Law Commission.*—On the recommendation of the Law Commission, the doctrine of cy-pres has been applied to suits under Section 92 of the Code. Sub-section 3 to Section 92 as inserted by the Code of Civil Procedure (Amendment) Act, 1976 incorporates the doctrine of cy-pres, which is similar to Section 13 of the English Charities Act, 1960.<sup>228</sup>

The application of the doctrine of cy-pres, however, has its own limitations. The court has no power, authority or jurisdiction to deviate from the intention expressed by the settlor on the ground of expediency or on what the court considers to be much more beneficial than what the settlor directed.<sup>229</sup>

227. *Ibid*, at p. 394 (AIR); see also *N.S. Rajabathar v. M.S. Vadivelu*, (1970) 1 SCC 12: AIR 1970 SC 1839.

228. Law Commission's Fifty-fourth Report at pp. 65-67; Sarkar, *Law of Civil Procedure* (9th Edn.) at p. 459; *Ram Sarup v. Union of India*, AIR 1985 Del 318. (1985) 27 DLT 134.

229. *Mayor of Lyons v. Advocate General of Bengal*, (1875-76) 3 IA 32. ILR (1876) 1 Cal 303 (PC); *Ratilal v. State of Bombay*, AIR 1954 SC 388: 1954 SCR 1055, *Halsbury's Laws of England* (3rd Edn.) Vol. IV at p. 324.



Part III

Appeals, Reference,  
Review and Revision



## CHAPTER 1

### General

Any person who feels aggrieved by any decree or order passed by a court may prefer an appeal in a superior court if an appeal is provided against that decree or order or may make an application for review or revision. In certain cases, a subordinate court may make a reference to a High Court. The provisions relating to Appeals, Reference, Review and Revision may be summarised thus:

- |                         |  |
|-------------------------|--|
| (A) <i>Appeals.</i> —   | Sections 96 to 112 and Orders 41 to 45                   |
|                         | First Appeals: Sections 96 to 99-A, 107 and Order 41     |
|                         | Second Appeals: Sections 100-103, 107, 108 and Order 42  |
|                         | Appeals from Orders: Sections 104-108 and Order 43       |
|                         | Appeals by Indigent Persons: Order 44                    |
|                         | Appeals to Supreme Court: Sections 109, 112 and Order 45 |
| (B) <i>Reference.</i> — | Section 113 and Order 46                                 |
| (C) <i>Review.</i> —    | Section 114 and Order 47                                 |
| (D) <i>Revision.</i> —  | Section 115  |

## CHAPTER 2

# First Appeals

### SYNOPSIS

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## 1. APPEAL: MEANING

The expression "appeal" has not been defined in the Code. According to dictionary meaning, "appeal" is "the judicial examination of the decision by a higher court of the decision of an inferior court".<sup>1</sup>

Stated simply, appeal is a proceeding by which the defeated party approaches a higher authority or court to have the decision of a lower authority or court reversed.

In *Nagendra Nath Dey v. Suresh Chandra Dey*<sup>2</sup>, speaking for the Judicial Committee of Privy Council, Sir Dinsha Mulla stated:

"There is no definition of appeal in the Code of Civil Procedure, but their Lordships have no doubt that any application by a party to an appellate

1. *Chamber's 21st Century Dictionary* (1997) at p. 59; *Wharton's Law Lexicon* at p. 72; *Concise Oxford English Dictionary* (2002) at p. 63; *Nagendra Nath Dey v. Suresh Chandra Dey*, (1931-32) 59 IA 283; AIR 1932 PC 165, *Garikapati Veeraya v. N. Subbiah Chaudhry*, AIR 1957 SC 540; 1957 SCR 488; *Lakshmiratan Engg. Works Ltd. v. Commr. (Judicial), Sales Tax*, AIR 1968 SC 488 at p. 492; (1968) 1 SCR 505; *Bolin Chetia v. Jogadish Bhuyan*, (2005) 6 SCC 81; *Nahar Industrial Enterprises Ltd. v. Hong Kong & Shanghai Banking Corpn.*, (2009) 8 SCC 646; *James Joseph v. State of Kerala*, (2010) 9 SCC 642.
2. (1931-32) 59 IA 283; AIR 1932 PC 165.

court, asking to set aside or reverse a decision of a subordinate court, is an appeal within the ordinary acceptance of the term."

An appeal is thus a removal of a cause from an inferior court to a superior court for the purpose of testing the soundness of the decision of the inferior court. It is a remedy provided by law for getting the decree of the lower court set aside. In other words, it is a complaint made to the higher court that the decree passed by the lower court is unsound and wrong.<sup>3</sup> It is "a right of entering a superior court and invoking its aid and interposition to redress an error of the court below".<sup>4</sup>

## 2. ESSENTIALS

Every appeal has three basic elements:<sup>5</sup>

- (i) A decision (usually a judgment of a court or the ruling of an administrative authority);
- (ii) A person aggrieved (who is often, though not necessarily, a party to the original proceeding); and
- (iii) A reviewing body ready and willing to entertain an appeal.

## 3. RIGHT OF APPEAL

A right of appeal is not a natural or inherent right.<sup>6</sup> It is well-settled that an appeal is a creature of statute and there is no right of appeal unless it is given clearly and in express terms by a statute.<sup>7</sup> Whereas sometimes an appeal is a matter of right, sometimes it depends upon discretion of the court to which such appeal lies. In the latter category of cases, the right is to apply to the court to grant leave to file an appeal; for instance, an appeal to the Supreme Court under Article 136 of the Constitution of India.<sup>8</sup> If a particular Act does not provide a right of appeal, it cannot

3. *Nagendra Nath Dey v. Suresh Chandra Dey*, (1931-32) 59 IA 283; AIR 1932 PC 165, *Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat*, (1969) 2 SCC 74

4. *Attorney General v. Sillem*, (1864) 10 HLC 704 at p. 715 11 ER 1200 at p. 1209 (per Lord Westbury, LC), see also *Dayawati v. Inderjit*, AIR 1966 SC 1423; (1966) 3 SCR 275

5. Louis Blom, "Final Appeal: A Study of the House of Lords in its Judicial Capacity"

6. *Ganga Bai v. Vijay Kumar*, (1974) 2 SCC 393 at p. 397 AIR 1974 SC 1126 at p. 1129, *Ram Manprasad v. Gopichand*, (1973) 4 SCC 89 at p. 92 AIR 1973 SC 566, *Ramnaram (P) Ltd v. State Trading Corpn. of India Ltd.*, (1983) 3 SCC 75 AIR 1983 SC 786, *Raj Kumar v. Directorate of Enforcement*, (2010) 4 SCC 772 AIR 2010 SC 2239

7. *Ibid*, see also *Anant Mills Co. Ltd. v. State of Gujarat*, (1975) 2 SCC 175 at p. 202 AIR 1975 SC 1234 at p. 1249, *Ram Manprasad Gordhandas v. Gopichand Snersingh Gupta* (1973) 4 SCC 89, *Ramnaram (P) Ltd v. State Trading Corpn. of India Ltd.* (1983) 3 SCC 75, *Gujarat Agro-Industries Co. Ltd. v. Municipal Corpn. of the City of Ahmedabad*, (1999) 4 SCC 468 AIR 1999 SC 1818, *CCE v. Flock (India) (P) Ltd.*, (2000) 6 SCC 650

8. For detailed discussion and case law, see, V.G. Ramchandran, *Law of Writs* (2006) Vol. II Pt. IV Chap. 2

be declared *ultra vires* only on that ground.<sup>9</sup> Again, the right of appeal is a substantive right and not merely a matter of procedure.<sup>10</sup> It is a vested right and accrues to the litigant and exists as on and from the date the *lis* commences and although it may be actually exercised when the adverse judgment is pronounced, such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.<sup>11</sup> This vested right of appeal can be taken away only by a subsequent enactment if it so provides expressly or by necessary implication, and not otherwise.<sup>12</sup>

Thus, if an appeal lies against an order passed by a Single judge of the High Court under Sections 397 and 398 of the Companies Act, 1956, to the Division Bench, the said right cannot be taken away on the ground that the High Court has not framed the necessary rules for filing such an appeal.<sup>13</sup> Substitution of a new forum of appeal should not be readily inferred.<sup>14</sup> The right being a creature of statute, conditions can always be imposed by the statute for the exercise of such right.<sup>15</sup>

In *Anant Mills Co. Ltd. v. State of Gujarat*<sup>16</sup>, speaking for the Supreme Court, Khanna, J. said:

"It is well-settled by several decisions of this court that the right of appeal is a creature of a statute and there is no reason why the legislature while granting the right cannot impose conditions for the exercise of such right so long as the conditions are not so onerous as to amount to unreasonable restrictions rendering the right almost illusory."<sup>17</sup>

9. *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569.

10. *Garikapati Veeraya v. N. Subbiah Chaudhry*, AIR 1957 SC 540; 1957 SCR 488; *Custodian of Evacuee Property v. Khan Saheb Abdul Shukoor*, AIR 1961 SC 1087 at p. 1092; (1961) 3 SCR 855; *Vijay Prakash v. Collector of Customs*, (1988) 4 SCC 402; AIR 1988 SC 2010; *Special Military Estates Officer v. Munivenkataramiah*, (1990) 2 SCC 168 at p. 172; AIR 1990 SC 499 at p. 502.

11. *Garikapati Veeraya v. N. Subbiah Chaudhry*, AIR 1957 SC 540; 1957 SCR 488, *Bhau Ram v. Bai Nath*, AIR 1961 SC 1327 (1962) 1 SCR 358; *P. Mohd. Meera v. Thirumalaya Gounder*, AIR 1966 SC 430 at p. 431. (1966) 1 SCR 574, *Mukund Deo v. Mahadu*, AIR 1965 SC 703 at p. 705; *Katikara Chintamani Dora v. Guntreddi Annamannaidu*, (1974) 1 SCC 567 at p. 582. AIR 1974 SC 1069 at p. 1081, *Ramnaram (P) Ltd. v. State Trading Corpn. of India Ltd.*, (1983) 3 SCC 75; *Deep Chand v. Land Acquisition Officer*, (1994) 4 SCC 99 at p. 102; AIR 1994 SC 1901 at p. 1904.

12. *Ibid.*

13. *Arti Dutta v. Eastern Tea Estate (P) Ltd.*, (1988) 1 SCC 523; AIR 1988 SC 325.

14. *Stridewell Leathers (P) Ltd. v. Bhankerpur Simbhaoli Beverages (P) Ltd.*, (1994) 1 SCC 34 at p. 38; AIR 1994 SC 158 at pp. 163-64.

15. *Anant Mills Co. Ltd. v. State of Gujarat*, (1975) 2 SCC 175, *Ramnaram (P) Ltd. v. State Trading Corpn. of India Ltd.*, (1983) 3 SCC 75, *Vijay Prakash D. Mehta v. Collector of Customs*, (1988) 4 SCC 402, *R. S. Nayak v. A.R. Antulay*, (1984) 2 SCC 183.

16. (1975) 2 SCC 175; AIR 1975 SC 1234.

17. *Ibid.*, at p. 202 (SCC) at p. 1249 (AIR), see also *Seth Nand Lal v. State of Haryana*, 1980 Supp SCC 574; AIR 1980 SC 2097, *Ram Manprasad v. Gopichand*, (1973) 4 SCC 89; AIR 1973 SC 566, *Mela Ram v. CIT*, AIR 1956 SC 367, *D.N. Taneja v. Bhajan Lal*, (1988)

#### 4. ONE RIGHT OF APPEAL

A single right of appeal is more or less a universal requirement. It is based on the principle that all men are fallible and judges are human beings who may commit a mistake. A Judge who has not committed an error is yet to be born. This dictum applies to all Judges from lowest to highest courts.<sup>18</sup> Absence of even one right of appeal must be considered to be a glaring lacuna in a legal system governed by the Rule of Law.<sup>19</sup>

A hierarchy of courts with appellate powers each having its own power of judicial review has of course being found to be counter-productive but the converse is equally distressing in that there is not even a single judicial review.<sup>20</sup>

The Law Commission also observed, "An unqualified right of first appeal may be necessary for the satisfaction of the decretal litigant but a wide right of second appeal is more in the nature of luxury".<sup>21</sup>

The only ground upon which a suitor ought to be allowed to bring the judgment of one court for examination before the members of another is the certainty or extreme probability.<sup>22</sup>

Sections 96, 100, 104 and 109 of the Code of Civil Procedure confer the right of appeal on aggrieved persons in cases mentioned therein. Sections 96 to 99 and 107 read with Order 41 deal with first appeals.

#### 5. SUIT AND APPEAL

There is a fundamental distinction between the right to file a suit and the right to file an appeal. The said distinction has been appropriately explained by Chandrachud, J. (as he then was) in the case of *Ganga Bai v. Vijay Kumar*<sup>23</sup> in the following words:

"There is a basic distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit for its

3 SCC 26, *Shyam Kishore v MCD*, (1993) 1 SCC 22. AIR 1992 SC 2279, *CCE v Flock (India) (P) Ltd.*, (2000) 6 SCC 650.

18 *Mona Pantwar v. High Court of Judicature of Allahabad*, (2011) 3 SCC 496 (507)

19. *Sita Ram v State of U P.*, (1979) 2 SCC 656 at pp 669, 676 AIR 1979 SC 745 at pp 754, 759, *Lt Col Prithi Pal Singh v Union of India*, (1982) 3 SCC 140 at pp 177-80 AIR 1982 SC 1473 at pp. 1437-38, *R.S Nayak v A R Antulay*, (1984) 2 SCC 183

20 *Ibid*, see also *Union of India v Charanjit S Gill*, (2000) 5 SCC 742 AIR 2000 SC 3425

21 Law Commission's Fifty-fourth Report at p 84, see also, Herbert, *Uncommon Law* (3rd Edn) at p 259

22 Herbert *Uncommon Law* (3rd Edn) at p 259

23 (1974) 2 SCC 393 AIR 1974 SC 1126

maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law."<sup>24</sup> (emphasis supplied)

Before more than hundred years, in *Zair Husain v. Khurshed Jan*<sup>25</sup>, the High Court of Allahabad stated:

"Unless a right of appeal is clearly given by a statute, it does not exist. Whereas a litigant has independently of any statute a right to institute any suit of a civil nature in one court or another."

## 6. APPEAL IS CONTINUATION OF SUIT

An appeal is a continuation of a suit.<sup>26</sup> A decree passed by an appellate court would be construed to be a decree passed by the Court of the first instance. An appeal is virtually a rehearing of the matter. The appellate court possesses the same powers and duties as the original court. Once again the entire proceedings are before the appellate court which can review the evidence as a whole, subject to statutory limitations, if any, and can come to its own conclusion on such evidence.<sup>27</sup>

In *Dayawati v. Inderjit*<sup>28</sup>, speaking for the Supreme Court, Hidayatullah, J. (as he then was) stated:

"An appeal has been said to be 'the right of entering a superior Court, and invoking its aid and interposition to redress the error of the Court below'. The only difference between a suit and an appeal is that an appeal 'only reviews and corrects the proceedings in a cause already constituted but does not create the cause'. "<sup>29</sup>

Moreover, where an appeal is provided by law and is filed against a decree or order passed by a lower court, the decision of the appellate court will be the operative decision. It is obvious that when an appeal is made, the appellate authority can do one of the three things, namely: (i) it may reverse the order under appeal; (ii) it may modify that order; and (iii) it may merely dismiss the appeal and thus confirm the order

24. *Ibid*, at p 397 (SCC). at p 1129 (AIR).

25. *Zair Husain v Khurshed Jan*, ILR (1906) 28 All 545.

26. *Garikapati Veeraya v. N Subbiah Chaudhry*, AIR 1957 SC 540. 1957 SCR 488; *Nair Service Society Ltd. v. K.C. Alexander*, AIR 1968 SC 1165 at p. 1177. (1968) 3 SCR 163; *Mithilesh Kumari v. Prem Behari*, (1989) 2 SCC 95; AIR 1989 SC 1247; *Lakshmi Narayan v. Niranjana Modak*, (1985) 1 SCC 270; *Darshan Singh v. Ram Pal Singh*, 1992 Supp (1) SCC 191 at p. 212; AIR 1991 SC 1654 at p. 1665, *Most Rev. P.M A Metropolitan v. Moran Mar Marthoma*, 1995 Supp (4) SCC 286; AIR 1995 SC 2001, *Dilip v. Mohd. Azizul Haq*, (2000) 3 SCC 607; AIR 2000 SC 1976, *D.P Reddy v. K. Sateesh*, (2008) 8 SCC 505.

27. *Ramankutty v. Avara*, (1994) 2 SCC 642 at p. 645.

28. AIR 1966 SC 1423 (1966) 3 SCR 275.

29. *Ibid*, at p. 1427 (AIR).

without any modification. In all these three cases after the appellate authority has disposed of the appeal, the operative order is the order of the appellate authority whether it has reversed the original order or modified it or confirmed it. [I]t is the appellate decision alone which subsists and is operative and capable of enforcement.<sup>30</sup> (emphasis supplied)

In *Garikapati Veeraya v. N. Subbiah Chaudhry*<sup>31</sup>, referring to various leading decisions on the subject, the Supreme Court laid down the following principles relating to a right of appeal:

- (i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.
- (ii) The right of appeal is not a mere matter of procedure but is a substantive right.
- (iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.
- (iv) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists on and from the date the *lis* commences and, although it may be actually exercised when the adverse judgment is pronounced, such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.
- (v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.<sup>32</sup>

## 7. APPEAL AND REVISION

The revisional jurisdiction of a High Court is a part and parcel of the appellate jurisdiction of the High Court. When the aid of the High Court is invoked on the revisional side it is done because it is a superior court and it can interfere for the purpose of rectifying the error of the court below. Revisional jurisdiction is one of the modes of exercising powers conferred by the statute; basically and fundamentally it is the

30 *Collector of Customs v East India Commercial Co Ltd*, AIR 1963 SC 1124 at p 1126 (1963) 2 SCR 563. See also *Nair Service Society Ltd v K C Alexander*, AIR 1968 SC 1165 at p 1177 (1968) 3 SCR 163, *Tarlok Singh v Municipal Corpn, Amritsar* (1986) 4 SCC 27 AIR 1986 SC 1957, *CIT v Amritlal Bhogilal and Co*, AIR 1958 SC 868 at p 871 1950 SCR 713.

31 AIR 1957 SC 540 1957 SCR 488

32 *Ibid*, at p 543 (AIR, per SR Das J), see also *LIC v India Automobiles & Co.* (1990) 4 SCC 286 AIR 1991 SC 884 *D N Taneja v Bhajan Lal*, (1988) 3 SCC 26 at p 32

appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense.<sup>33</sup>

There is, however, an essential distinction between the two. The distinction is based in the two expressions i.e. "appeal" and "revision". A right of appeal carries with it a right of rehearing on law as well as on fact, unless the statute conferring the right of appeal limits the rehearing in one way or the other. The power to hear a revision is generally given to a superior court so that it may satisfy itself that a particular case has been decided according to law.<sup>34</sup> The conferment of revisional jurisdiction is to keep subordinate courts within the bounds of their authority and to make them act according to the procedure established by law.<sup>35</sup> Revisional jurisdiction is not wide enough to make the High Court a second court of first appeal.<sup>36</sup> The High Court cannot, in exercise of revisional powers, substitute its own view for the view taken by a subordinate court.<sup>37</sup>

Again, an appeal is a continuation of the proceedings; in effect the entire proceedings are before the appellate authority and it has power to review the evidence subject to the statutory limitations.<sup>38</sup> But in the case of a revision, whatever powers the revisional authority may or may not have, it has not the power to re-examine, review or reassess the evidence and to substitute its own findings unless the statute expressly confers on it that power.<sup>39</sup> *That limitation is implicit in the concept of revision.*<sup>40</sup> (emphasis supplied)

In *Associated Cement Co. Ltd. v. Keshvanand*<sup>41</sup>, the Supreme Court stated, "It is trite legal position that appellate jurisdiction is coextensive with original court's jurisdiction as for appraisal and appreciation

33. *Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat*, (1969) 2 SCC 74. AIR 1970 SC 1

34. *Harī Shankar v. Rao Girdhari Lal*, AIR 1963 SC 698 at pp 700-01; 1962 Supp (1) SCR 933; *Amarjit Kaur v. Pritam Singh*, (1974) 2 SCC 363; AIR 1974 SC 2068; *Sk Jaffar v. Mohd. Pasha*, (1975) 1 SCC 25 at p. 28. AIR 1975 SC 794; *Manick Chandra v. Debdas Nandy*, (1986) 1 SCC 512 at pp. 516-17. AIR 1986 SC 446.

35. *Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar*, (1980) 4 SCC 259; AIR 1980 SC 1253.

36. *Dattonpant v. Vithalrao*, (1975) 2 SCC 246. AIR 1975 SC 1111.

37. *Girdharbhai v. Saiyed Mohd. Mirasaheb Kadri*, (1987) 3 SCC 538 at p. 551; AIR 1987 SC 1782 at p. 1789.

38. *Mohanlal v. Sawai Man Singhji*, AIR 1962 SC 73 (1961) 1 SCR 702, *Dayawati v. Inderjit*, AIR 1966 SC 1423. (1966) 3 SCR 275; *Amarjit Kaur v. Pritam Singh*, (1974) 2 SCC 363; AIR 1974 SC 2068; *Hasmat Rai v. Raghunath Prasad*, (1981) 3 SCC 103; AIR 1981 SC 1711; *Union of India v. Cyanamide India Ltd.*, (1987) 2 SCC 720; AIR 1987 SC 1802; *Mithilesh Kumari v. Prem Behari*, (1989) 2 SCC 95. AIR 1989 SC 1247.

39. *State of Kerala v. K.M. Charia Abdulla & Co.*, AIR 1965 SC 1585 at p. 1587; (1965) 1 SCR 601; *Manick Chandra Nandy v. Debdas Nandy*, (1986) 1 SCC 512, *Lachhman Dass v. Santokh Singh*, (1995) 4 SCC 201.

40. *Lachhman Dass v. Santokh Singh*, (1995) 4 SCC 201.

41. (1998) 1 SCC 687. AIR 1998 SC 596.

of evidence and reaching findings of facts and appellate court is free to reach its own conclusions on evidence untrammelled by any finding entered by the trial court. Revisional powers on the other hand belong to supervisory jurisdiction of a superior court. While exercising revisional powers the court has to confine itself to the legality and propriety of the findings and also whether the subordinate court has kept itself within the bounds of its jurisdiction, including the question whether the court has failed to exercise jurisdiction vested in it. *Though the difference between the two jurisdictions is subtle, it is quite real and has now become well recognised in legal provinces.*"<sup>42</sup> (emphasis supplied)

It is submitted that the following observations of Hidayatullah, J. (as he then was) in *Hari Shanker v. Rao Girdhari Lal*<sup>43</sup> lay down correct law on the point. Speaking for the majority, His Lordship concluded.

"The distinction between an appeal and a revision is a real one. A right of appeal carries with it a right of rehearing on law as well as fact, unless the statute conferring the right of appeal limits the rehearing in some way as, we find, has been done in second appeal arising under the Code of Civil Procedure. The power to hear a revision is generally given to a superior court so that it may satisfy itself that a particular case has been decided according to law. Under Section 115 of the Code of Civil Procedure, the High Court's powers are limited to see whether in a case decided, there has been an assumption of jurisdiction where none existed, or refusal of jurisdiction where it did, or there has been material irregularity or illegality in the exercise of that jurisdiction. The right there is confined to jurisdiction and jurisdiction alone. In other Acts, the power is not so limited, and the High Court is enabled to call for the record of a case to satisfy itself that the decision therein is according to law and to pass such orders in relation to the case, as it thinks fit."<sup>44</sup>

## 8. FIRST APPEAL AND SECOND APPEAL

A first appeal lies against a decree passed by a court exercising original jurisdiction, a second appeal lies against a decree passed by a first appellate court. Whereas a first appeal can be filed in a superior court which may or may not be a High Court, a second appeal can be filed only in the High Court. A first appeal is maintainable on a question of fact, or on a question of law, or on a mixed question of fact and law. A second appeal can be filed only on a substantial question of law. No second appeal lies if the amount does not exceed Rs 3000.<sup>45</sup> No Letters Patent Appeal is maintainable against a "judgment" rendered by a

42 *Ibid.* at p. 692 (SCC) at p. 598 (AIR) (per Thomas, J.) see also *Sarla Ahuja v. United India Insurance Co. Ltd.* (1968) 8 SCC 110.

43 AIR 1963 SC 698; 1962 Supp (1) SCR 333.

44 *Ibid.* at pp. 599-601 (AIR).

45 S. 102.

Single judge of the High Court to a Division Bench of the same court either in First Appeal or in Second Appeal.<sup>46</sup>

## 9. CONVERSION OF APPEAL INTO REVISION

If an appeal is preferred in a case in which no appeal lies, the court may treat the memorandum of appeal as a revision or vice versa.<sup>47</sup> Since there is no specific provision for such conversion, the court would be justified in invoking the inherent powers under Section 151 and in passing appropriate orders as may be necessary in the interests of justice.<sup>48</sup> There is no period of limitation for making an application of conversion. But while exercising this power, the court should see if the appeal or the revision, as the case may be, has been filed within the time prescribed for filing such a proceeding.<sup>49</sup>

## 10. RIGHT OF APPEAL: MATERIAL DATE

The right of appeal is a substantive and vested right and accrues in favour of the litigant on the day the *lis* commences and although it may be actually exercised only after an adverse judgment is pronounced, such a right is governed by the law prevailing at the date of the institution of the suit and not by the law in force at the time when the judgment is rendered or an appeal is preferred.<sup>50</sup>

## 11. SECTION 96

Section 96 of the Code confers a right of appeal. It reads as under:

96. *Appeal from Original decree.*—(1) Save where otherwise expressly provided in the body of this Code, or by any other law for the time being in force, an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorized to hear appeals from the decisions of such court.

46. S 100-A, see also *infra*, "Letters Patent Appeal"

47. *Reliable Water Supply Service of India v. Union of India*, (1972) 4 SCC 168; AIR 1972 SC 2083 at p. 2085, *Karuppan v. Santaram*, AIR 1973 Ker 28, *Chhelaram v. Manak*, AIR 1997 Raj 284; *Amal Chandra v. Anita Biswas*, (2006) 4 Cal HN 644.

48. *Ibid*, For detailed discussion of S. 151, see *infra*, Pt. V, Chap. 4.

49. *Bahori v. Vidya Ram*, AIR 1978 All 299, 1978 All WC 387; *Ram Prasad v. Nand Kumar & Bros.*, (1998) 6 SCC 748 at p. 751; AIR 1998 SC 2730, *J.K. Cotton Spg. & Wvg. Mills Co. Ltd. v. CCE*, (1998) 3 SCC 540 at p. 546; AIR 1998 SC 1270.

50. *Colonial Sugar Refining Co. Ltd. v. Irving*, 1905 AC 369 (PC), *Garikapati Veeraya v. N. Subbiah Chaudhry*, AIR 1957 SC 540, 1957 SCR 488, *Dayawati v. Inderjit*, AIR 1966 SC 1423, (1966) 3 SCR 275; *Sita Ram v. State of U.P.*, (1979) 2 SCC 656; AIR 1979 SC 745; *Nahar Industrial Enterprises Ltd. v. Hong Kong & Shanghai Banking Corpn.*, (2009) 8 SCC 646.

- (2) An appeal may lie from an original decree passed *ex parte*.
- (3) No appeal shall lie from a decree passed by the court with the consent of parties.
- (4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognisable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed three thousand rupees.

## 12. WHO MAY APPEAL?

Section 96 of the Code recognises the right of appeal from every decree passed by any court exercising original jurisdiction. It does not refer to or enumerate the persons who may file an appeal. But before an appeal can be filed under this section, two conditions must be satisfied:

- (i) The subject-matter of the appeal must be a "decree", that is, a conclusive determination of "the rights of the parties with regard to all or any of the matters in controversy in the suit";<sup>51</sup> and
- (ii) The party appealing must have been adversely affected by such determination.<sup>52</sup>

The ordinary rule is that only a party to a suit adversely affected by the decree or any of his representatives-in-interest may file an appeal.<sup>53</sup> But a person who is not a party to a decree or order may, with the leave of the court, prefer an appeal from such decree or order if he is either bound by the order or is aggrieved by it or is prejudicially affected by it.<sup>54</sup>

The test whether a person is an *aggrieved person* is to see whether he has a genuine grievance because an order has been made which prejudicially affects his interests either pecuniary or otherwise.<sup>55</sup> As has been observed in the case of *Krishna v. Mohesh*<sup>56</sup>, "the question who may appeal is determinable by the common sense consideration that there can be no appeal where there is nothing to appeal about".

Generally speaking, a decision cannot be said to adversely affect a person unless it will operate as *res judicata* against him in any future suit.<sup>57</sup> In order to find out whether a decision will operate as *res judicata*

51 S. 2(2) For detailed discussion of "Decree", see *supra*, Pt I, Chap 2

52 *State of Punjab v Amar Singh*, (1974) 2 SCC 70 at p 89. AIR 1974 SC 994 at p 1006

53 *Ibid.*

54 *Ibid.*, *Jatan Kumar v Golcha Properties (P) Ltd*, (1970) 3 SCC 573 at p 575 AIR 1971 SC 374 at p 376

55 *Adi Pheroze Shah Gandhi v H M Seervai*, (1970) 2 SCC 484 at p 503 AIR 1971 SC 385 at p 399 For detailed discussion of "Aggrieved person", see, *Authors Lectures on Administrative Law* (2012) Lecture IX

56 (1905) 9 CWN 584 at p 588

57 *State of Punjab v Amar Singh*, (1974) 2 SCC 70, *Adi Pheroze Shah Gandhi v H M Seervai* (1970) 2 SCC 484

and will thus adversely affect a party, the substance of the judgment and decree, and not the form, must be considered. For this purpose the court may go behind the decree to see what really the adjudication was.

The question whether a party is or is not adversely affected by a decree is a question of fact to be determined in each case according to its particular circumstances and no rule of universal application can be laid down.

From the above general principles, the following persons are entitled to appeal under this section:

- (i) A party to the suit who is aggrieved or adversely affected by the decree, or if such party is dead, his legal representatives.<sup>58</sup>
- (ii) A person claiming under a party to the suit or a transferee of the interests of such party, who, so far as such interest is concerned, is bound by the decree, provided his name is entered on the record of the suit.<sup>59</sup>
- (iii) A guardian *ad litem* appointed by the court in a suit by or against a minor.<sup>60</sup>
- (iv) Any other person, with the leave of the court, if he is adversely affected by the decree.<sup>61</sup>

### 13. APPEAL BY ONE PLAINTIFF AGAINST ANOTHER PLAINTIFF

As a general rule, one plaintiff cannot file an appeal against a co-plaintiff. But where the matter in controversy in the suit forms subject-matter of dispute between plaintiffs *inter se*, an appeal can be filed by one plaintiff against another plaintiff.<sup>62</sup>

### 14. APPEAL BY ONE DEFENDANT AGAINST ANOTHER DEFENDANT

The principle which applies to filing of appeal by one plaintiff against another plaintiff equally applies to an appeal by one defendant against another defendant. It is only where the dispute is not only between the plaintiffs and the defendants but between defendants *inter se* and such

58. S. 146; see also *Kirpal Kuar v. Bachan Singh*, AIR 1958 SC 199; 1958 SCR 950; *Saila Bala Dassi v. Nirmala Sundari Dassi*, AIR 1958 SC 394 at p. 398; 1958 SCR 1287; *Banarsi v. Ram Phal*, (2003) 9 SCC 606 (615).

59. *Ibid.*

60. S. 147, Or. 32 R. 5.

61. *State of Punjab v. Amar Singh*, (1974) 2 SCC 70; *Adi Pherozshah Gandhi v. H M. Seervai*, (1970) 2 SCC 484.

62. *Vithu v. Bhima*, ILR (1891) 15 Bom 145; *Bank of India v. Mehta Bros*, AIR 1991 Del 194.

decision adversely affects one defendant against the other that such appeal would be competent.<sup>63</sup>

### 15. WHO CANNOT APPEAL?

If a party agrees not to appeal or waives his right to appeal, he cannot file an appeal and will be bound by an agreement if otherwise such agreement is valid.<sup>64</sup> Such an agreement, however, must be clear and unambiguous. Whether a party has or has not waived his right of appeal depends upon the facts and circumstances of each case.<sup>65</sup> Similarly, where a party has accepted the benefits under a decree of the court, he can be estopped from questioning the legality of the decree.<sup>66</sup>

As Scrutton, L.J.<sup>67</sup> observed, "It startles me that a person can say the judgment is wrong and at the same time accept the payment under the judgment as being right . . . . In my opinion, you cannot take the benefit of a judgment as being good and then appeal against it as being bad."

Finally, the vested right of appeal is destroyed if the court to which an appeal lies is abolished altogether without any forum being substituted in its place.<sup>68</sup>

### 16. AGREEMENT NOT TO APPEAL

A right of appeal is a statutory right. If a statute does not confer such right, no appeal can be filed even with the consent or agreement between the parties.<sup>69</sup>

But an agreement between the parties not to file an appeal is valid if it is based on lawful or legal consideration and if otherwise it is not illegal.<sup>70</sup>

63. *Nirmala Bala v Balai Chand*, AIR 1965 SC 1874; (1965) 3 SCR 550; *P N Kesavan v Lekshmy Amma*, AIR 1968 Ker 154, *Bhima Jally v. Nata Jally*, AIR 1977 Ori 59.

64. *Ameer Ali v Inderjeet Singh*, (1871) 14 MIA 203 (PC)

65. *Ibid*, see also *Protap Chunder v Arathoon*, ILR (1882) 8 Cal 455, *Mohd Mia Pandit v Osman Ali*, AIR 1935 Cal 239 ILR (1935) 62 Cal 229

66. *Dexters Ltd v Hill Crest Oil Co.*, (1926) 1 KB 348 (1925) All ER Rep 273 95 LJ KB 386 (CA), *R C Chandiook v Chuni Lal*, (1970) 3 SCC 140 AIR 1971 SC 1238, see also *supra*, Pt II, Chap 6

67. *Dexters Ltd v Hill Crest Oil Co.*, (1926) 1 KB 348

68. *Daji Sahab v Shankar Rao*, AIR 1956 SC 29 at p 30 (1955) 2 SCR 872.

69. For detailed discussion, see *supra* 'Rights of appeal'

70. *Kalikara Chintamani Dora v Guntreddi Annamamaidu*, (1974) 1 SCC 567 AIR 1974 SC 1069, *Ameer Ali v Inderjeet Singh* (1871) 14 MIA 203 (PC)

## 17. APPEAL: NOMENCLATURE NOT MATERIAL

The use of expression "appeal", "first appeal" or "second appeal" is neither material nor decisive. It is the substance and not the form which is relevant.

In *Ramchandra Goverdhan Pandit v. Charity Commr.*<sup>71</sup>, a first appeal was filed in the High Court against an order passed by the Charity Commissioner on an application under Section 72 of the Bombay Public Trusts Act, 1950. The Supreme Court held that the appeal before the Single judge of the High Court was in substance and in reality Second Appeal and Letters Patent Appeal was not maintainable against the "judgment" by the Single judge.

## 18. APPEAL AGAINST EX PARTE DECREE: SECTION 96(2)

As stated above,<sup>72</sup> one of the remedies available to the defendant, against whom an *ex parte* decree is passed, is to file an appeal against such a decree under Section 96(2) of the Code, though he may also file an application to set aside *ex parte* decree.

Both the remedies are concurrent and can be resorted to simultaneously. One does not debar the other. As has been rightly said:

"Where two proceedings or two remedies are provided by a statute, one of them must not be taken as operating in derogation of the other."<sup>73</sup>

In an appeal against an *ex parte* decree, the appellate court is competent to go into the question of the propriety or otherwise of the *ex parte* decree passed by the trial court.

## 19. NO APPEAL AGAINST CONSENT DECREE: SECTION 96(3)

Section 96(3) declares that no appeal shall lie against a consent decree. This provision is based on the broad principle of estoppel. It presupposes that the parties to an action can, expressly or impliedly, waive or forgo their right of appeal by any lawful agreement or compromise

71. (1987) 3 SCC 273; AIR 1987 SC 1598; see also *Parvez Rustamji v. Navroji Sorabji*, AIR 2001 Guj 160.

72. See *supra*, Pt II, Chap. 8

73. *Ajudhia Prasad v. Balmukund*, ILR (1866) 8 All 354 (FB), *Rani Choudhury v. Sura*, Jit Choudhury, (1982) 2 SCC 596. AIR 1982 SC 1393; *Archana Kumar v. Purendu Prakash*, (2000) 2 MP LJ 491 (FB).

or even by conduct. The consideration for the agreement involved in a consent decree is that both the sides give up their right of appeal.<sup>74</sup>

Once the decree is shown to have been passed with the consent of the parties, Section 96(3) becomes operative and binds them. It creates an estoppel between the parties as a judgment on contest.<sup>75</sup> Where there is a partial compromise and adjustment of a suit and a decree is passed in accordance with it, the decree to that extent is a consent decree and is not appealable.<sup>76</sup> This provision, however, does not apply where the factum of compromise is in dispute or the compromise decree is challenged on the ground that such compromise had not been arrived at lawfully.<sup>77</sup>

## 20. NO APPEAL IN PETTY CASES: SECTION 96(4)

Section 96(4) has been inserted by the Amendment Act of 1976. It bars appeals except on points of law in certain cases. Prior to 1976, Section 96 allowed a first appeal against every decree. Now, sub-section (4) bars appeals on facts from decrees passed in petty suits where the amount or value of the subject-matter of the original suit does not exceed ten thousand rupees, if the suits in which such decrees are passed are of a nature cognisable by Courts of Small Causes. The underlying object in enacting the said provision is to reduce appeals in petty cases. Such restrictions are necessary in the interests of the litigants themselves. They should not be encouraged to appeal on facts in trivial cases.<sup>78</sup>

## 21. APPEAL AGAINST PRELIMINARY DECREE

An appeal lies against a preliminary decree.<sup>79</sup> A preliminary decree is as much a final decree. In fact, a final decree is but a machinery for the implementation of a preliminary decree.<sup>80</sup> Failure to appeal against a preliminary decree, hence, precludes the aggrieved party from

74. *Katikara Chintamani Dora v. Guntreddi Annamanaidu*, (1974) 1 SCC 567 at pp 584-85 AIR 1974 SC 1069 at p 1081.

75. *Ibid*, see also *Thakur Prasad v. Bhagwan Das*, AIR 1985 MP 171 1985 MP LJ 149

76. *Ibid*, For detailed discussion, see, *Authors' Code of Civil Procedure* (Lawyers' Edn) Vol. II at pp 329-32.

77. *Banwari Lal v. Chando Devi*, (1993) 1 SCC 581 AIR 1993 SC 1139, see also *Thakur Prasad v. Bhagwan Das*, AIR 1985 MP 171 1985 MP LJ 149 1985 1ab LJ 248

78. Law Commission's Fifty-fourth Report at p 72. Statement of Objects and Reasons see also, Clause 9 on "Notes on Clauses" to the CPC (Amendment) Bill, 1997

79. *Phoolchand v. Gopal Lal*, AIR 1967 SC 1470 (1967) 3 SCR 153, see also S 97

80. *Venkata Reddy v. Pethi Reddy*, AIR 1963 SC 992 at pp 994-95 1963 Supp (2) SCR 616 *Mool Chand v. Director Consolidation*, (1995) 5 SCC 631 AIR 1995 SC 2493 *Shankar v. Chandrakant* (1995) 3 SCC 413 AIR 1995 SC 1211

challenging the final decree.<sup>81</sup> Where an appeal is filed against a preliminary decree and is allowed and the decree is set aside, the final decree falls to the ground as ineffective since there is no preliminary decree to support the final decree.<sup>82</sup>

## 22. NO APPEAL AGAINST FINAL DECREE WHERE NO APPEAL AGAINST PRELIMINARY DECREE

As stated above, an appeal lies against a preliminary decree since a preliminary decree is as much a decree as a final decree. A final decree may be said to be but a machinery for the implementation of the preliminary decree. In fact, a final decree owes its existence to the preliminary decree. Therefore, a failure to appeal against a preliminary decree precludes the aggrieved party from disputing its correctness or raising any objection to it in the appeal against the final decree.<sup>83</sup> The whole object of enacting Section 97 is to make it clear that any party being aggrieved by a preliminary decree must appeal against that decree; and if he fails to appeal against such a decree, the correctness of such a decree cannot be challenged by way of an appeal against the final decree, which means that the preliminary decree would be taken to have been correctly passed.<sup>84</sup>

## 23. APPEAL AGAINST JUDGMENT

The Code provides an appeal from a decree and not from a judgment. An aggrieved party, however, may file an appeal against the judgment, if a decree is not drawn up by the court.<sup>85</sup>

## 24. NO APPEAL AGAINST FINDING

Section 96 of the Code enacts that an appeal shall lie from every decree passed by any court exercising original jurisdiction. So also, Section 100 allows a second appeal to the High Court from every decree passed in appeal. Likewise, an appeal lies against an order under Section 104 read

81. *Ibid*, see also, S. 97.

82. *Ibid*, see also *Sital Parshad v. Kishori Lal*, AIR 1967 SC 1236 at p. 1240: (1967) 3 SCR 101.

83. S. 97; see also *Venkata Reddy v. Pethi Reddy*, AIR 1963 SC 992 at p. 994-95: 1963 Supp (2) SCR 616; *Mool Chand v. Director, Consolidation*, (1995) 5 SCC 631: AIR 1995 SC 2493.

84. *Kaushalya Devi v. Baijnath Sayal*, AIR 1961 SC 790 at p. 794: (1961) 3 SCR 769; *Chittoori v. Kudappa*, AIR 1965 SC 1325 at pp. 1332, 1339. (1965) 2 SCR 661.

85. Or. 20 Rr. 6-A, 6-B; Or. 41 R. 1 (1); see also *Jagat Dhish v. Jawahar Lal*, AIR 1961 SC 832: (1961) 2 SCR 918, *Harī Shankar v. Jag Deyee*, (2000) 39 All LR 120.

with Order 43 Rule 1 of the Code. It, however, states that no appeal shall lie from other orders.<sup>86</sup> Hence, an appeal lies only against a "decree" or an "order" which is expressly made appealable under the Code.

A finding recorded by a court of law may or may not amount to a "decree" or an "order". Where such a finding does not amount to a "decree" or an "order", no appeal lies against such adverse finding. Thus, where a suit is dismissed, the defendant against whom some adverse finding has been recorded on some issue has no right of appeal and he cannot question the finding by instituting an appeal.<sup>87</sup>

The Explanation to Rule 22 of Order 41, as added by the Amendment Act of 1976, however, enables the respondent to file cross-objections against any finding recorded against him even though the ultimate decree may be in his favour.<sup>88</sup>

## 25. APPEAL AGAINST DEAD PERSON

No appeal can be instituted against a dead person. Such an appeal, therefore, can be regarded as a "stillborn" appeal. In such cases, an application can be made praying for the substitution of the legal representatives of the deceased respondent who died prior to the filing of the appeal. In that case, the appeal can be taken to have been filed on the date of the application for substitution of the legal representatives. If, by that time, the appeal is time-barred, the appellant can seek condonation of delay.<sup>89</sup>

## 26. FORM OF APPEAL<sup>90</sup>: RULES 1-4

As stated above, Sections 96 to 99-A enact the substantive law as regards First Appeals, while Order 41 lays down the procedure relating thereto. The expressions *appeal* and *memorandum of appeal* denote two distinct things. An appeal is the judicial examination by a higher court of the decision of a lower court. The memorandum of appeal contains the grounds on which judicial examination is invited. For purposes of

<sup>86</sup> S 105.

<sup>87</sup> *Ganga Bai v Vijay Kumar*, (1974) 2 SCC 393; AIR 1974 SC 1126. *Deva Ram v Ishwar Chand*, (1995) 6 SCC 733, *Banarsi v Ram Phal*, (2003) 9 SCC 606 AIR 2003 SC 1989.

<sup>88</sup> *Banarsi v Ram Phal*, (2003) 9 SCC 606 AIR 2003 SC 1989, *Shyam Nath v Durga Prasad*, AIR 1982 All 474 at pp. 476-77.

<sup>89</sup> *Bank of Commerce Ltd. v Protap Chandra Ghose*, AIR 1946 FC 13, 1946 FCR 32. *N. Jayaram Reddy v Revenue Divisional Officer*, (1979) 3 SCC 578 AIR 1979 SC 1393. *M. Veerappa v Evelyn Sequeira*, (1988) 1 SCC 556 AIR 1988 SC 506. *Karuppaswamy v C. Ramamurthy*, (1993) 4 SCC 41 AIR 1993 SC 2324.

<sup>90</sup> For Model First Appeal, see Appendix D.

limitation and for purposes of the rules of the court, a memorandum of appeal is required to be filed.<sup>91</sup>

In order that an appeal may be said to be validly presented, the following requirements must be complied with:<sup>92</sup>

- (i) It must be in the form of a memorandum setting forth the grounds of objections to the decree appealed from;
- (ii) It must be signed by the appellant or his pleader;
- (iii) It must be presented to the court or to such officer as it appointed;
- (iv) The memorandum must be accompanied by a (certified) copy of the judgment;<sup>93</sup> and
- (v) Where the appeal is against a money decree, the appellant must deposit the decretal amount or furnish the security in respect thereof as per the direction of the court.<sup>94</sup>

The memorandum of appeal must contain the grounds of objections to the decree appealed from, concisely, under distinct heads, without any argument or narrative and should be numbered consecutively.<sup>95</sup>

Rule 2 precludes the appellant from urging, except with the leave of the court, any grounds of objection not set forth in the memorandum of appeal. The underlying object of this provision is to give notice to the respondent of the case he has to meet at the hearing of the appeal.<sup>96</sup>

The appellate court, however, is entitled to decide an appeal even on a ground not set forth in the memorandum of appeal.<sup>97</sup> But when the appellate court *suo motu* proposes to do so, the party affected must be given an opportunity to contest the case on that ground.

A memorandum of appeal should be prepared after carefully considering (i) the pleadings; (ii) the issues; (iii) the findings thereon; (iv) the judgment; and (v) the decree.

91. *Lakshmiratan Engg. Works Ltd. v. Commr. (Judicial), Sales Tax*, AIR 1968 SC 488 at pp. 492-93. (1968) 1 SCR 505, *Shyam Kishore v. MCD*, (1993) 1 SCC 22. AIR 1992 SC 2279.

92. Or. 41 R. 1. See also *Jagat Dhish v. Jawahar Lal*, AIR 1961 SC 832; (1961) 2 SCR 918; *Phoolchand v. Gopal Lal*, AIR 1967 SC 1470 at p. 1472; (1967) 3 SCR 153, *Shakuntala Devi Jain v. Kuntal Kumari*, AIR 1969 SC 575 (577). (1969) 1 SCR 1006, *Shastri Yagnapurushdasji v. Muldas Bhundardas*, AIR 1966 SC 1119. (1966) 3 SCR 242; *Dipo v. Wassan Singh*, (1983) 3 SCC 376. AIR 1983 SC 846; *Jogdhayan v. Babu Ram*, (1983) 1 SCC 26; AIR 1983 SC 57, *Ramnarain (P) Ltd. v. State Trading Corpn. of India Ltd.*, (1983) 3 SCC 75. AIR 1983 SC 786, *State of Rajasthan v. Raj Singh*, (1996) 5 SCC 516. AIR 1996 SC 2812.

93. It may be stated that before the Amendment Act, 1999, the memorandum of appeal was required to be accompanied by a (certified) copy of the decree as also a (certified) copy of the judgment (unless dispensed with by the Appellate Court).

94. R. 1(3).

95. R. 1(2).

96. *Kalyanpur Lime Works Ltd. v. State of Bihar*, AIR 1954 SC 165 at p. 169. 1954 SCR 958; *Chittoori v. Kudappa*, AIR 1965 SC 1325 at p. 1336-37. (1965) 2 SCR 661; *Daman Singh v. State of Punjab*, (1985) 2 SCC 670 at p. 682; AIR 1985 SC 973 at p. 980.

97. *Yeshwant Deorao v. Walchand Ramchand*, AIR 1951 SC 16 at p. 20. 1950 SCR 852; *Chittoori Subbanna v. Kudappa Subbanna*, AIR 1965 SC 1325, at pp. 1328-29 (AIR)

Where the memorandum of appeal is not in a proper form, the court may reject it or return it to the appellant for the purpose of being amended.<sup>98</sup>

Rule 4 provides that where a decree proceeds upon a ground common to all the plaintiffs or defendants, any one of the plaintiffs or defendants may appeal from the whole decree, and thereupon the appellate court can reverse or vary the decree in favour of all the plaintiffs or the defendants, as the case may be.<sup>99</sup>

The general rule is that on an appeal by one of the several plaintiffs or defendants, an appellate court can reverse or vary the decree of the trial court only in favour of the party appealing. Rule 4 is an exception to this principle. It confers on the court the power to make an appropriate order needed in the interests of justice by reversing or varying the decree in favour of all the plaintiffs or defendants, as the case may be. In such a case, an appeal by one is virtually treated as an appeal on behalf of all, though they may not be parties to the appeal.<sup>100</sup> Rule 4 is based on two considerations; *firstly*, to give the appellate court full power to do justice to all parties, whether before it or not; and *secondly*, to prevent contradictory decisions in the matter in the same suit.<sup>101</sup>

## 27. MEMORANDUM OF APPEAL<sup>102</sup>

## 28. FORUM OF APPEAL

The right of appeal is undoubtedly a substantive right and its deprivation is a serious prejudice. But there is no vested right in procedure. Hence, no one can claim that one's appeal should be heard by a particular court. Change in the forum of appeal, therefore, cannot be said to cause prejudice to a party.<sup>103</sup>

98. R 3; see also *State of M P v. Pradeep Kumar*, (2000) 7 SCC 372.

99. *Lal Chand v. Radha Krishan*, (1977) 2 SCC 88 at p 93 AIR 1977 SC 789 at pp 792-93

100. *Rameshwar Prasad v. Shambehari Lal*, AIR 1963 SC 1901 at p 1904. (1964) 3 SCR 549, *Ratan Lal v. Lalmandas*, (1969) 2 SCC 70 AIR 1970 SC 108

101. *Jagdei v. Sampat Dube*, AIR 1937 All 796 at p 797, *Harihar Prasad v. Balmiki Prasad*, (1975) 1 SCC 212 AIR 1975 SC 733, *Har Narain v. Chandgi* 1987 Supp SCC 738 AIR 1987 SC 1325, *Banarsi v. Ram Phal*, (2003) 9 SCC 606. AIR 2003 SC 1989, see also *supra*, Pt II, Chap 8

102. For detailed discussion, see *supra* "Form of appeal"

103. *Custodian of Evacuee Property v. Khan Saheb Abdul Shukoor* AIR 1961 SC 1087 (1961) 3 SCR 855, *Ityavira Mathai v. Varkey Varkey*, AIR 1964 SC 907 (1964) 1 SCR 495, *Maria Christina v. Amira Zurana*, AIR 1965 SC 432, *Garikapati Veeraya v. N. Subbiah Chaudhry*, AIR 1957 SC 540 1957 SCR 488, *Gopalakrishna Pillai v. Meenakshi Ayal* AIR 1967 SC 155 1966 Supp SCR 128, *Francisco Luis v. Vithal* AIR 1980 Bom 303, *Mohinder Singh v. Jagjit Singh*, AIR 1960 Punj 434, *Municipal Committee Simla v. Gurdial Singh* AIR 1973 HI 64, *Gopal v. Chimabai*, AIR 1938 Bom 464, *Shivan v. Deon*, AIR 1974 MP 123, *Kiran Singh v. Chaman Paswan*, AIR 1954 SC 340 at p 342 (1955) 1

## 29. VALUATION IN APPEAL

For the purpose of jurisdiction of the court, the appellant has to put valuation in appeal. Such valuation may be the same for jurisdiction as well as for court fees, for instance, an appeal for recovery of money due. It may differ also, for instance, in suits for partition, pre-emption, redemption of mortgage, etc.<sup>104</sup>

## 30. PRESENTATION OF APPEAL: RULES 9-10

Rule 9 states that the court from whose decree an appeal lies *shall* entertain the memorandum of appeal, *shall* make an endorsement thereon and *shall* register the appeal in register of appeals.<sup>105</sup>

In view of the above provision of filing of appeals in the court which passed the decree, Rules 13, 15 and 18 requiring notice to the court whose decree is under challenge have been deleted.

It is, however, submitted that the provision relating to filing of appeals is vague, ambiguous, unclear and confusing. It is not clear whether Rule 9 is merely an enabling or permissive provision or is imperative and peremptory. No doubt, it uses the expression "*shall*". But suppose, the aggrieved appellant intends to file an appeal in an appellate court directly where an appeal lies, he cannot be prevented from instituting such appeal in a court competent to hear the appeal. Can such court refuse to entertain an appeal though it is an appellate forum under the Code? Obviously, not.<sup>106</sup> Again, even after entertaining an appeal, what the trial court will do with the memorandum of appeal? How it will forward the said memorandum of appeal and records and proceedings to the appellate court in absence of any provision to that effect. It may be stated that there was a provision for transmission of record by a trial court to an appellate court (Rule 13), which has been deleted. At

SCR 117, *Stridewell Leathers (P) Ltd. v. Bhankerpur Simbhaoli Beverages (P) Ltd.*, (1994) 1 SCC 34; AIR 1994 SC 158

104 *Ramnarain (P) Ltd. v. State Trading Corpn. of India Ltd.*, (1983) 3 SCC 75. AIR 1983 SC 786. For detailed discussion, see *supra*, Pt. I, Chap. 1.

105 R 9 O. 41 as amended from 1 July 2002 reads thus,  
 "9. *Registry of memorandum of appeal.*—(1) The Court from whose decree an appeal lies shall entertain the memorandum of appeal and shall endorse thereon the date of presentation and shall register the appeal in a book of appeal kept for that purpose.

(2) Such book shall be called the register of appeal."

106. It may be stated that in *Salem Advocate Bar Assn. v. Union of India*, (2003) 1 SCC 49. AIR 2003 SC 189, the Supreme Court held that the interpretation that Rule 9 requires an appeal to be filed in the same court which passed the decree is not correct. An appeal must be filed in the court before which it is maintainable

present, there is no specific or express provision relating to transmission of record by the trial court.<sup>107</sup>

The matter does not rest there. Suppose, the appellant wants to obtain stay, injunction or other interim order. Who will grant such relief? Rule 5(1) has remained unamended. Under that rule, only an appellate court can grant interim order. It, therefore, can safely be said that no such order can be made by the court which passed the decree, which is under challenge. Once an appeal is instituted, sub-rule (2) of Rule 5 gets exhausted and has no application.<sup>108</sup> What will happen then?

In the opinion of the author, all these questions, at least for the time being, have remained unanswered.<sup>109</sup>

Under Rule 10(1) the appellate court may at its discretion require the appellant to furnish security for the costs of appeal or of the suit or of both. Where the appellant is residing out of India and does not possess sufficient immovable property within India other than the subject-matter of the appeal, it is obligatory on the court to demand security in such cases.<sup>110</sup>

107. R. 13 as it stood before the Amendment Act of 1999 ran thus.

"13. *Appellate Court to give notice to Court whose decree appealed from.*—(1) Where the appeal is not dismissed under Rule 11, the appellate court shall send notice of the appeal to the Court from whose decree the appeal is preferred.

(2) *Transmission of papers to Appellate Court.*—Where the appeal is from the decree of a Court, the records of which are not deposited in the appellate court, the Court receiving such notice shall send with all practicable despatch all material papers in the suit, or such appears as may be specially called for the appellate court.

(3) *Copies of exhibits in Court whose decree appealed from.*—Either party may apply in writing to the Court from whose decree the appeal is preferred, specifying any of the papers in such Court of which he requires copies to be made and copies of such papers shall be made at the expense of, and given to, the applicant."

108. R. 5(1) and (2) read as under:

"5. *Stay by Appellate Court*—(1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree, but the appellate court may for sufficient cause order stay of execution of such decree.

*Explanation.*—An order by the appellate court for the stay of execution of the decree shall be effective from the date of the communication of such order to the Court of first instance, but an affidavit sworn by the appellant based on his personal knowledge, stating that an order for the stay of execution of the decree has been made by the appellate court shall, pending the receipt from the appellate court of the order for the stay of execution or any order to the contrary be acted upon by the Court of first instance.

(2) *Stay by Court which passed the decree*—Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

109. For analytical discussion, see *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. VI Or. 41.

110. Provide to R. 10(1)

The object of Rule 10 is to secure the respondent from the risk of having to incur further costs in an appeal which he might otherwise never recover from the appellant. An order for furnishing security may be made either before the respondent is called upon to appear and answer or afterwards on his application. Where the appellant fails to furnish security within the time granted by the court or the time subsequently extended by it, the court shall reject the appeal.<sup>111</sup> The appellate court may, however, at its discretion restore an appeal which has been rejected for failure to give security for costs.<sup>112</sup> An application for restoration can be filed within thirty days from the date of the rejection of an appeal.<sup>113</sup>

### 31. LIMITATION

The Code of Civil Procedure confers a right of appeal, but does not prescribe a period of limitation for filing an appeal. The Limitation Act, 1963, however, provides the period for filing appeals. It states that an appeal against a decree or order can be filed in a High Court within ninety days and in any other court within thirty days from the date of the decree or order appealed against.<sup>114</sup>

### 32. CONDONATION OF DELAY: RULE 3-A

Rule 3-A has been inserted by the Amendment Act of 1976. It provides that where an appeal has been presented after the expiry of the period of limitation specified therefor, it shall be accompanied by an application that the applicant had sufficient cause for not preferring the appeal within time.

Prior to insertion of Rule 3-A, the practice was to admit such an appeal subject to the objection regarding limitation. This practice was disapproved by the Privy Council,<sup>115</sup> and it stressed the expediency of adopting a procedure for securing the final determination of the question as to limitation before admission of the appeal. This rule is added to give effect to the recommendation of the Privy Council.<sup>116</sup>

As observed by the Supreme Court in *State of M.P. v. Pradeep Kumar*<sup>117</sup>, the object of this provision is twofold; *firstly*, to inform the appellant

111. R 10(2); see also *Lekha v Bhauna*, (1896) 18 All 101 (FB).

112. *Balwant Singh v. Daulat Singh*, ILR (1886) 8 All 315 (PC), *Basantlal v Naidu*, AIR 1962 AP 10.

113. Art. 122, Limitation Act, 1963.

114. Art. 116, Limitation Act, 1963.

115. *Krishnasami Pondikondar v. Ramasami Chettiar*, (1917-18) 45 IA 25 AIR 1917 PC 179.

116. Statement of Objects and Reasons, see also *Naran Anappa v. Jayantlal*, AIR 1987 Guj 205. (1986) 1 Guj LR 206.

117. (2000) 7 SCC 372.

that the delayed appeal will not be entertained unless it is accompanied by an application explaining the delay; and *secondly*, to communicate to the respondent that it may not be necessary for him to get ready on merits as the court has to first deal with an application for condonation of the delay as a condition precedent. The provision is, however, directory and not mandatory. If the memorandum of appeal is filed without an accompanying application for condonation of delay, the consequence is not necessarily fatal. The defect is curable.<sup>118</sup>

Interpreting the provision in its proper perspective, the Court stated:

"It is true that the pristine maxim *vigilantibus, non dormientibus, jura subeniunt* (law assists those who are vigilant and not those who sleep over their rights). But even a vigilant litigant is prone to commit mistakes. As the aphorism "to err is human" is more a practical notion of human behaviour than an abstract philosophy, the unintentional lapse on the part of a litigant should not normally cause the doors of the judicature permanently closed before him. *The effort of the court should not be one finding means to pull down the shutters of adjudicatory jurisdiction before a party who seeks justice on account of any mistake committed by him, but to see whether it is possible to entertain his grievance if it is genuine.*"<sup>119</sup> (emphasis supplied)

### 33. STAY OF PROCEEDINGS: RULES 5-8

Rule 5 provides for stay of an execution of a decree or an order. After an appeal has been filed, the appellate court may order stay of proceedings under the decree or the execution of such decree. But mere filing of an appeal does not suspend the operation of a decree. Stay may be granted if sufficient grounds are established.<sup>120</sup>

The object underlying Rule 5 is to safeguard the interests of both, the decree-holder and the judgment-debtor. It is the right of the decree-holder to reap the fruits of his decree. Similarly, it is the right of the judgment-debtor not merely to get barren success in case his appeal is allowed by the appellate court. This rule thus strikes a just and reasonable balance between these two opposing rights.

The following conditions must, therefore, be satisfied before stay is granted by the court<sup>121</sup>:

- (a) The application has been made without unreasonable delay;
- (b) Substantial loss will result to the applicant unless such order is made; and

118 *Ibid* at p 378 (SCC)

119 *Ibid* at pp 376-77 (SCC) (*per* Thomas J)

120 R 5(1)(2), see also *Kamla Devi v. Takhatmal* AIR 1964 SC 859 at p 862 (1964) 2 SCR 152, *Mool Chand v. Raza Buland Sugar Co. Ltd.* (1982) 3 SCC 484, *Durg Kumar v. Ramesh Chandra*, 1991 Supp (2) SCC 260, *Atma Ram Properties (P) Ltd. v. Federal Motors (P) Ltd.*, (2005) 1 SCC 705

121 R 5(3) (4).

- (c) Security for the due performance of the decree or order has been given by the applicant.

The court may also make an *ex parte* order for stay of execution pending the hearing of the application if the above conditions are satisfied.

Rule 3-A(3), however, lays down that the court shall not grant stay of the execution of a decree against which an appeal is proposed to be filed so long as the court does not, after hearing under Rule 11, decide to hear the appeal on merits.

In case of money decree, sub-rule (3) of Rule 1 as inserted by the Amendment Act, 1976 provides for the deposit of the decretal amount or for the furnishing of security. This provision has been made for the benefit of the decree-holder and with a view to lessen his hardship. Deposit of the decretal amount, however, is not a condition precedent for the presentation of an appeal.<sup>122</sup>

Sub-rule (5) of Rule 5 as added in 1976 mandates that no stay of execution of a decree shall be granted unless the deposit is made or security is furnished.

Explanation to Rule 5(1) clarifies that the order of stay becomes effective from the date of communication to the court of first instance and not prior thereto.

Where an order has been made for the execution of a decree from which an appeal is pending, on sufficient cause being shown by the appellant, the court which passed the decree shall take security from the decree-holder for the restitution of any property which may be or has been taken in execution and for due performance of the decree or order of the appellate court. If such an application is made to the appellate court, it may direct the trial court to take such security.<sup>123</sup>

Where an order for sale of immovable property in execution of a decree has been passed and the appeal has been pending against such decree, on an application being made by the judgment-debtor, the court must stay the sale of immovable property on giving security or otherwise as it thinks fit.<sup>124</sup>

### 34. SUMMARY DISMISSAL: RULES 11-11-A

Rule 11 deals with the power of the appellate court to dismiss an appeal summarily. This rule refers to a stage after the memorandum of appeal has been filed and the appeal has been registered under Rule 9. Rule 11 embodies a general principle that whenever an appeal is preferred, the

122. *Mehta Teja Singh and Co. v. Grindlays Bank Ltd.*, (1982) 3 SCC 199; *Union Bank of India v. Jagan Nath Radhey Shyam and Co.*, AIR 1979 Del 36, *Dijabar v. Sulabha*, AIR 1986 Ori 38, *Malwa Strips (P) Ltd v. Jyoti Ltd*, (2009) 2 SCC 426.

123. R. 6(1), (2).

124. R. 6(2), see also *Pratibha Singh v. Shanti Devi*, (2003) 2 SCC 330. AIR 2003 SC 643.

appellate court is entitled, after hearing the appellant or his advocate, to reject the appeal summarily if *prima facie* there is no substance in it.<sup>125</sup>

The discretion, however, must be exercised judiciously and not arbitrarily. Such power should be used very sparingly and only in exceptional cases. When an appeal raises triable issues, it should not be summarily dismissed.<sup>126</sup>

Where the appellate court which dismisses an appeal summarily is other than a High Court, it must record reasons for doing so.<sup>127</sup> However, in matters involving construction of documents, even a High Court should record reasons.<sup>128</sup>

The same principle applies to Second Appeals,<sup>129</sup> Letters Patent Appeals arising out of First Appeals since in such appeal (LPA), all questions of fact and law are open to challenge.<sup>130</sup>

Again, when the first appellate court affirms the findings of the trial court, it is its duty to record reasons in brief for doing so. It is all the more necessary in a case where such court is a final court of finding of fact and where the judgment of the trial court is based on appreciation of oral and documentary evidence which is seriously challenged by the contesting party.<sup>131</sup>

But once an appeal is admitted, the court cannot dismiss it on technical grounds or without hearing the appellant.<sup>132</sup> Similarly, an appeal cannot be admitted partly. It can be admitted or dismissed wholly.<sup>133</sup> If the appellant or his pleader does not appear when the appeal is called on for hearing, the court may dismiss it for default.<sup>134</sup> The word *may* shows that the court has discretion in the matter and is not bound to dismiss the appeal for default of appearance. The court may adjourn the hearing of the appeal to a future date or even admit it. Where an appeal is dismissed for default, it may be restored if it is proved that the

125. R. 11(1).

126. *Mahadev Tukaram v. Sugandha*, (1973) 3 SCC 746: AIR 1972 SC 1932. *Umakant Vishnu v. Pramulabai*, (1973) 1 SCC 152: AIR 1973 SC 218; *Vinod Trading Co. v. Union of India*, (1982) 2 SCC 40; *Kiranmal v. Dnyanoba Bajirao*, (1983) 4 SCC 223. AIR 1983 SC 461. For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn) Vol VI, Or 41 R. 11.

127. R. 11(4), see also *Govinda Kadtuji v. State of Maharashtra*, (1970) 1 SCC 469. AIR 1970 SC 1033.

128. *Shanker v. Gangabai*, (1976) 4 SCC 112.

129. Or 42 R. 1, see also *Department of Horticulture, Chandigarh v. Raghu Raj*, (2008) 13 SCC 395. AIR 2009 SC 514.

130. *Gaudiya Mission v. Shobha Bose*, AIR 2008 SC 1012.

131. *Kerala Transport Co. v. Shah Mamlal Mulchand* 1991 Supp (2) SCC 461 at p. 462.

132. *Dipo v. Wassan Singh*, (1983) 3 SCC 376. AIR 1983 SC 846, *Ibhand Singh v. Gram Sabha of Village Umri* (1971) 3 SCC 980.

133. *Rampi Bhagata v. Krishnarao*, (1982) 1 SCC 433. AIR 1982 SC 1223.

134. R. 11(2). See also *Thakur Sukhpal Singh v. Thakur Kalvan Singh* AIR 1963 SC 146 (1963) 2 SCR 733. *Shantilal v. Bai Basi* AIR 1976 Guj 1 (1975) 16 Guj LR 1.

appellant was prevented by any sufficient cause from appearing when the appeal was called on for hearing.<sup>135</sup>

### 35. ABATEMENT OF APPEAL

The provisions relating to abatement of suits apply to appeals also.<sup>136</sup>

### 36. ADMISSION OF APPEAL: RULES 12, 14

If the appeal is not summarily dismissed, the appellate court shall fix a day for hearing of the appeal, and the notice of such date of hearing shall be served upon the respondent with a copy of the memorandum of appeal.<sup>137</sup>

### 37. DOCTRINE OF MERGER

Where an appeal is provided against a decree passed by the trial court and such appeal is preferred, it is the decree of the appellate court which is operative in law, which can be enforced.

The doctrine of merger is based on the principle that there cannot be, at one and the same time, more than one operative decree governing the same subject-matter. Hence, as soon as an appeal is decided by an appellate court, the decree of the trial court ceases to have existence in the eyes of the law and is superseded by a decree by an appellate court. In other words, the decree passed by the trial court merges with the decree of the appellate court.<sup>138</sup>

### 38. PROCEDURE AT HEARING: RULES 16-21

#### (a) Right to begin: Rule 16

The appellant has a right to begin.<sup>139</sup> After hearing the appellant in support of the appeal, if the court finds no substance in the appeal, it may dismiss the appeal at once without calling upon the respondent

135. R. 19.

136. Or. 22 R. 11. For detailed discussion, see *supra*, Pt. II, Chap. 13.

137. Rr. 12, 14.

138. *Jowad Hussain v. Gendan Singh*, (1925-26) 53 IA 197 : AIR 1926 PC 63; *Lachmeshwar Prasad v. Keshwar Lal*, AIR 1941 FC 5; 1940 FCR 84; *CIT v. Amritlal Bhogilal and Co.*, AIR 1958 SC 868; 1959 SCR 713, *Collector of Customs v. East India Commercial Co. Ltd.*, AIR 1963 SC 1124; (1963) 2 SCR 563; *State of Madras v. Madurai Mills Co. Ltd.*, AIR 1967 SC 681; (1967) 1 SCR 732, *Gojer Bros (P) Ltd. v. Ratan Lal Singh*, (1974) 2 SCC 453; AIR 1974 SC 1380, *Dilip v. Mohd. Azizul Haq*, (2000) 3 SCC 607 AIR 2000 SC 1976

139. R. 16(1).

to reply. But if the appellate court does not dismiss the appeal at once, it will hear the respondent against the appeal and the appellant shall then be entitled to reply.<sup>140</sup>

### (b) Dismissal for default and restoration: Rules 17-19

If the appellant does not appear when the appeal is called on for hearing, the court may dismiss the appeal in default.<sup>141</sup> The court, however, cannot dismiss it on merits.<sup>142</sup>

Where the appeal has been dismissed for default or for non-payment of process fees, the appellant may apply to the appellate court for the restoration of the appeal. On sufficient cause being shown, the appellate court shall restore the appeal on such terms as to costs or otherwise as it thinks fit.<sup>143</sup> The court may require the counsel to go on for hearing after restoration and may refuse to restore the matter for further adjournment.<sup>144</sup> Appearance of a party or his advocate and prayer for recalling of an order of dismissal for default may be a good ground for restoring a matter but it cannot be said to be a good ground for restoration of the matter for hearing in future. In other words, "a matter may be restored for hearing and not for adjournment".<sup>145</sup>

### (c) Ex parte hearing and rehearing: Rules 17, 21

Where the appellant appears and the respondent does not appear when the appeal is called on for hearing, the appeal shall be heard *ex parte*.<sup>146</sup> If the judgment is pronounced against the respondent, he may apply to the appellate court for rehearing of the appeal. If he satisfies the court that the notice of appeal was not duly served upon him or that he was prevented by sufficient cause from appearing when the appeal was

140. R. 16(2).

141. R. 17(1). See also *New Brahma Kshatriya Coop. Housing Society v Govindlal*, AIR 1975 Guj 173 (1974) 15 Guj LR 689; *Ajit Kumar v. Chiranjibi Lal*, (2002) 3 SCC 609 AIR 2002 SC 1447; *Shiv Kumar v. Darshan Kumar*, (2009) 2 SCC 116.

142. Expln. to R. 17(1). See also *Shantilal v. Bai Basi*, AIR 1976 Guj 1 (1975) 16 Guj LR 1; *Abdur Rahman v. Athifa Begum*, (1996) 6 SCC 62, *Secy., Dept. of Horticulture v. Raghu Raj* (2009) 1 Guj LH 457 (SC).

143. R. 19. See also *Rafiq v. Munshilal*, (1981) 2 SCC 788 AIR 1981 SC 1400; *Goswami Krishna v. Dhan Prakash*, (1981) 4 SCC 574; *Savithri Amma Seethamma v. Aratha Karthu*, (1983) 1 SCC 401 AIR 1983 SC 318; *Lachi Tewari v. Director of Land Records*, 1984 Supp SCC 431 AIR 1984 SC 41; *Mangilal v. State of M.P.*, (1994) 4 SCC 564.

144. *New Brahma Kshatriya Coop. Housing Society v. Govindlal Narbheram Thakore*, AIR 1975 Guj 173 (1974) 15 Guj LR 689 at p. 696; *Madhumilan Syntex Ltd. v. Union of India*, (2007) 11 SCC 297 AIR 2007 SC 1481.

145. *Madhumilan Syntex Ltd. v. Union of India*, (2007) 11 SCC 297 at pp. 305-06 AIR 2007 SC 1481 (per C. K. Thakker, J.).

146. R. 17(2).

called on for hearing, the court shall rehear the appeal on such terms as to costs or otherwise as it thinks fit.<sup>147</sup>

However, ordinarily, no *ex parte* decree should be passed by a court except on reliable evidence.<sup>148</sup>

#### (d) Addition of respondent: Rule 20

Where it appears to the appellate court at the hearing of the appeal that any person who was a party to the suit in the trial court but who has not been made a party to the appeal is interested in the result of the appeal, the court may adjourn the hearing of the appeal and direct that such person be joined as a respondent.<sup>149</sup> Such addition of a respondent cannot be ordered after the expiry of the period of limitation for appeal, unless the reasons are recorded for doing so.<sup>150</sup> The Court can also make an order as to costs.<sup>151</sup>

The object of Rule 20 is to protect parties to the suit who have not been made respondents in the appeal from being prejudiced by modifications being made behind their back in the decree under appeal.<sup>152</sup> Over and above Rule 20, the appellate court has inherent power to add a party respondent or to transpose a party from one category to another.<sup>153</sup>

### 39. CROSS-OBJECTIONS: RULE 22

#### (a) General

Order 41 Rule 22 is a special provision permitting the respondent who has not filed an appeal against the decree to object to the said decree by filing cross-objections in the appeal filed by the opposite party.<sup>154</sup> Filing

147. R. 21; see also *Sourindra Mohan v. State of W.B.*, (1982) 2 SCC 360; AIR 1982 SC 1193; *Savithri Amma Seethamma v. Aratha Karthy*, (1983) 1 SCC 401; AIR 1983 SC 318.

148. *Sudha Devi v. M.P. Narayanan*, (1988) 3 SCC 366; AIR 1988 SC 1381.

149. R. 20(1); see also *SBI v. Ramkrishna Pandurang*, 1990 Supp SCC 801; AIR 1990 SC 1981; *Shew Bux v. Bengal Breweries Ltd.*, AIR 1961 SC 137; (1961) 1 SCR 680.

150. R. 20(2). See also *Ch. Surat Singh v. Manohar Lal*, (1971) 3 SCC 889; AIR 1971 SC 240.

151. R. 20(2).

152. *Suoramaniam v. Veerabhadram*, ILR (1908) 31 Mad 442.

153. *Saila Bala Dassi v. Nirmala Sundari Dassi*, AIR 1958 SC 394 at p. 398; 1958 SCR 1287.

154. R. 22(1) Or. 41 reads thus:

"Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the appellate court within one month from the date of service on him or his pleader notice of the date fixed for hearing the appeal, or within such further time as the appellate court may see fit to allow."

of cross-objections by the respondent, however, is optional and voluntary. The provision is permissive and enabling and not peremptory or obligatory.<sup>155</sup> Where the suit is partly decided in favour of the plaintiff and partly in favour of the defendant and the aggrieved party (either the plaintiff or the defendant) files an appeal, the opposite party may adopt any of the following courses:

- (i) He may prefer an appeal from that part of the decree which is against him. Thus, there may be two appeals against the same decree; one by the plaintiff and the other by the defendant. They are known as "cross-appeals". Both these appeals will be disposed of together.
- (ii) He may not file an appeal against the part of the decree passed against him but may take objection against that part. Such objections are called "cross-objections".
- (iii) Without filing a cross-appeal or cross-objection, he may support the decree (a) on the grounds decided in his favour by the trial court; or (b) even on the grounds decided against him.<sup>156</sup>

### (b) Meaning

The expression "cross-objection" has not been defined in the Code. Stated simply, cross-objections are filed by the respondent against the appellant in an appeal filed by the appellant against the respondent.

### (c) Nature

The expression "cross-objection" expresses the intention of the legislature that it can be directed by the respondent against the appellant. One cannot treat an objection by a respondent in which the appellant has no interest as a cross-objection. *The appeal is by the appellant against a respondent, the cross-objection must be an objection by a respondent against the appellant.*<sup>157</sup> (emphasis supplied)

155. *Ravinder Kumar v. State of Assam*, (1999) 7 SCC 435 (444-45); AIR 1999 SC 3571. *Post Graduate Institute of Medical Education and Research v. A.P. Wasan*, (2005) 5 SCC 321.

156. *Ramanbhai Ashabhai v. Dabhi Ajitkumar Fulsinj*, AIR 1965 SC 669 at p. 676 (1965) 1 SCR 712, *Indian Cable Co. v. Workmen*, (1974) 3 SCC 11 at pp. 17-18 AIR 1972 SC 2195 at pp. 2198-99, *Choudhary Sahu v. State of Bihar*, (1982) 1 SCC 232 at p. 235 AIR 1982 SC 98 at p. 99, *CST v. Vijai International Udyog*, (1984) 4 SCC 543 AIR 1985 SC 109, *Krishan Gopal v. Haji Mohd. Muslim*, AIR 1969 Del 126, *Bihar Supply Syndicate v. Asiatic Navigation*, (1993) 2 SCC 639 at pp. 650-51, *Union of India v. Kolluri Ramaiah*, (1994) 1 SCC 367 at p. 370 AIR 1994 SC 1149 at p. 1151, *Banarsi v. Ram Phal*, (2003) 9 SCC 606 AIR 2003 SC 1989, *S. Nazeer Ahmed v. State Bank of Mysore*, (2007) 11 SCC 75 AIR 2007 SC 989, see also *infra*, "Modification of decree Rule 31".

157. *Vadlamudi Venkateswarlu v. Ravipati Ramamma* AIR 1950 Mad 370 ILR 1950 Mad 874 (FB), *Panna Lal v. State of Bombay*, AIR 1963 SC 1516 (1964) 1 SCR 980, *Mahant Dhangir v. Madan Mohan*, 1987 Supp SCC 528 AIR 1988 SC 54.

A cross-objection is like cross-appeal. It has thus all the trappings of an appeal. The mere distinction between the two lies in the fact that whereas cross-objections form part of the same record, cross-appeals are two distinct and independent proceedings.<sup>158</sup>

#### (d) Who may file cross-objections?

Cross-objections can be filed by the respondent (1) if he could have filed an appeal against any part of the decree;<sup>159</sup> or (2) if he is aggrieved by a finding in the judgment, even though the decree is in his favour.<sup>160</sup>

Cross-appeals and cross-objections provide two different remedies for the same purpose since the cross-objections can be filed on the points on which that party could have preferred a cross-appeal.<sup>161</sup> The right to file cross-objections is substantive in nature and not merely procedural.<sup>162</sup>

#### (e) Against whom cross-objections may be filed

Ordinarily, cross-objections may be filed only against the appellant. In exceptional cases, however, one respondent may file cross-objections against the other respondents<sup>163</sup>; for instance, when the appeal by some of the parties cannot effectively be disposed of without opening the matter as between the respondents *inter se*; or in a case where the objections are common as against the appellant and co-respondent.<sup>164</sup>

Thus, where the relief sought against the appellant in cross-objections is intermixed with the relief granted to the other respondents in such a way that the relief against the appellant cannot be granted without the question being reopened between the objecting respondent and other respondents, cross-objections by one respondent against the other respondents may be allowed.<sup>165</sup>

158. *N. Jayaram Reddy v. Revenue Divisional Officer*, (1979) 3 SCC 578; AIR 1979 SC 1393; *Superintending Engineer v. B. Subba Reddy*, (1999) 4 SCC 423. AIR 1999 SC 1747.

159. R. 22(1); see also *N. Jayaram Reddy v. Revenue Divisional Officer*, (1979) 3 SCC 578; AIR 1979 SC 1393.

160. Expln. to R. 22(1).

161. *N. Jayaram Reddy v. Revenue Divisional Officer*, (1979) 3 SCC 578; AIR 1979 SC 1393 [It may, however, be stated that no appeal lies against a mere "finding" if such finding does not amount to "decree". For detailed discussion, see *supra*, "No appeal against finding". But cross-objections can be filed even against a "finding" which may not amount to decree; see Expln. to R. 22(1)].

162. *Panna Lal v. State of Bombay*, AIR 1963 SC 1516 at p. 1520. (1964) 1 SCR 980.

163. *Ibid.*, see also *Mahant Dhangir v. Madan Mohan*, 1987 Supp SCC 528.

164. *Panna Lal*, AIR 1963 SC 1516; *Mahant Dhangir*, 1987 Supp SCC 528 at p. 533; AIR 1988 SC 54 at p. 57.

165. R. 22(4), see also *Hari Shankar v. Sham Manohar*, (2005) 3 SCC 761; *Superintending Engineer v. B. Subba Reddy*, (1994) 4 SCC 423. AIR 1999 SC 1747.

The principle that no decision can be made against a person who is not a party to the proceedings applies to cross-objections also. Hence, cross-objections cannot be allowed against a person who is not a party to the appeal.

#### (f) When cross-objections may be filed?

The provisions of Order 41 Rule 22 contemplates right to file cross-objections only when an appeal is filed and also when such appeal is admitted by the appellate court and notice is issued on the respondent.<sup>166</sup>

A stage of filing cross-objections arises only when an appeal is admitted and the court directs notice to be issued to the respondent. No cross-objections, hence, can be filed if no appeal is filed by the appellant or an appeal is filed but has not been admitted. Mere posting of preliminary hearing of an appeal is not enough. Similarly, prior to service of notice of hearing of appeal by the court, no cross-objections would lie. That, however, does not make cross-objections suffer from legal infirmity.<sup>167</sup>

#### (g) Ambit and scope

Where the respondent has filed cross-objections, even if the original appeal is withdrawn or dismissed for default, they will be heard and decided on merits.<sup>168</sup> Where an appeal is withdrawn or dismissed for default and the cross-objections are decided on merits, restoration of appeal and rehearing will not automatically warrant rehearing of cross-objections.<sup>169</sup>

But where the appeal is dismissed as time-barred<sup>170</sup>, or has abated<sup>171</sup>, or is held to be not maintainable<sup>172</sup>, the cross-objections cannot be heard on merits as they are contingent and dependent upon the hearing of the appeal.<sup>173</sup>

166. *Balwant Singh v. State of M P.*, 1986 MP LJ 571; 1986 Jab LJ 686

167. *Manthena Ramanamma v. Tehsildar*, AIR 1976 AP 81, *Ram Kripal v Radhey Shyam*, AIR 1970 Raj 234 1970 Cri LJ 1558; (2003) 4 JLR 502; (2004) 3 JLR 246 (Jhar)

168. R. 22(1), see also *N Jayaram Reddy v Revenue Divisional Officer*, (1979) 3 SCC 578 AIR 1979 SC 1393

169. *Nanoo Gopinathan v. Neelacantan Balakrishnan*, AIR 1990 Ker 197

170. *Charity Commr v Padmavati*, AIR 1956 Bom 86, *A L A Alagappa Chettiar v Chockalinagam Chetty*, AIR 1919 Mad 784 (FB), *Ram Chand v Ramku*, AIR 1977 HP 82

171. *Abdullamiya Hamduniya v Mohamedmiya Gulamhusein*, AIR 1949 Bom 276, *U. Col P H Choudhary v Altaf Ahmed*, AIR 1963 AP 382, *Jayaram Reddy v Revenue Divisional Officer*, (1979) 3 SCC 578 AIR 1979 SC 1393

172. *Kashiram Senu v Ranglal Motilalshet*, AIR 1941 Bom 242 *Ram Chand v Ramku*, *supra*, *Chanchalgauri v Narendrakumar* AIR 1986 Guj 55 *Municipal Corpn of Delhi v International Security & Intelligence Agency Ltd*, (2004) 3 SCC 250 AIR 2003 SC 1515 2003 AIR SCW 870

173. *N Jayaram Reddy v Revenue Divisional Officer*, (1979) 3 SCC 578

### (h) Cross-appeal whether may be treated as cross-objections

An appeal filed beyond the period of limitation may be treated as cross-objections under Order 41 Rule 22. A cross-appeal may be treated as cross-objection only if such appeal is filed after the other appeal and not if it is filed before that appeal.<sup>174</sup>

### (i) Form

Cross-objections shall be in the form of a memorandum of appeal and they should be served on the party affected thereby or his pleader.<sup>175</sup> A respondent can file cross-objections as an indigent person.<sup>176</sup>

### (j) Limitation

Cross-objections can be filed within one month from the date of service on the respondent or his pleader of the notice of the date fixed for hearing of the appeal.<sup>177</sup> The appellate court may, at its discretion, extend the period within which cross-objections can be filed.<sup>178</sup> The discretion, however, must be exercised judicially and on sufficient cause for delay being shown and is open to review by the superior court.

### (k) Cross-objection against finding: Explanation to Rule 22(1)

Explanation to sub-rule (1) of Rule 22 of Order 41, as added by the Amendment Act, 1976 permits respondent to file cross-objection not only against *decree* but also against *finding* not amounting to *decree*. The position, however, as regards filing of appeal has remained as it was before the amendment.<sup>179</sup>

After the amendment in Rule 22 now, a party to a suit who has succeeded and whose favour, a decree is passed by the court cannot file an appeal against any "finding" recorded against him, but if the other side prefers an appeal against the decree, he may file cross-objection against the "finding" of the lower court notwithstanding that the ultimate decision or decree may be partly or wholly in his favour.

174. *Nripjit Kaur v. Sardar Satinder Singh*, AIR 1955 Punj 190; *Bhagai Ram v. Raghbar Dial*, AIR 1925 Lah 57; *Mihan Singh v. Tilak Ram*, AIR 1934 Lah 273, *Labhu Ram v. Ram Pratap*, AIR 1944 Lah 76; (1969) 1 Mys LJ 507; *S.M. Singh v. Punjabi University, Patiala*, AIR 1975 Punj 318.

175. R. 22(2).

176. R. 22(5).

177. R. 22(1).

178. *Vishwa Nath v. Maharaji*, AIR 1977 All 459.

179. Notes on Clauses.

### (l) Withdrawal or dismissal of appeal

Once the respondent files cross-objections, even if the appeal is withdrawn or dismissed for default, cross-objections will be heard and decided on merits.<sup>180</sup>

### (m) Procedure at hearing

The appeal and the cross-objections should be heard together and they should be disposed of by a common judgment incorporating the decisions on both; the appeal as well as the cross-objections.<sup>181</sup>

### (n) Court-fee

Cross-objection is like an appeal. Court fee is, therefore, payable on cross-objection like that on memorandum of appeal.<sup>182</sup>

### (o) Cross-objection by indigent respondent

Provisions relating to appeal by indigent persons also apply to cross-objections. An indigent respondent, hence, may file cross-objections as an indigent person.<sup>183</sup>

### (p) Omission to file cross-objections

A party in whose favour a decree has been passed has a substantive and valuable right which should not be lightly interfered with. As an ordinary rule, therefore, in the absence of a cross-appeal or cross-objection by a respondent, the appellate court has no power to disturb the decree of the lower court so far as it is in favour of the appellant. This is, however, subject to the provisions of Order 41 Rule 33 of the Code<sup>184</sup>

180. R 22(4); see also *Hari Shankar v. Sham Manohar*, (2005) 3 SCC 761, *Superintending Engineer v. B. Subba Reddy*, (1994) 4 SCC 423. AIR 1999 SC 1747.

181. R. 22(5) See also *Krishan Gopal v. Han Mohd Muslim*, AIR 1969 Del 126.

182. *Superintending Engineer v. B. Subba Reddy*, (1999) 4 SCC 423. AIR 1999 SC 1747.

183. R 22(5)

184. *Choudhary Sahu v. State of Bihar*, (1982) 1 SCC 232 at p. 235. AIR 1982 SC 98 at p. 99, *Nirmala Bala v. Balai Chand*, AIR 1965 SC 1874 (1965) 3 SCR 550, *Mahant Dhangir v. Madan Mohan*, 1987 Supp SCC 528. AIR 1988 SC 54, *Panna Lal v. State of Bombay*, AIR 1963 SC 1516, *Banarsi v. Ram Phal*, (2003) 9 SCC 606. AIR 2003 SC 1989, *State of Gujarat v. Dharmistaben Narendrasinh Rana*, (2001) 3 Guj LR 2056.

### (q) Disposal of appeal and cross-objections

The court should decide and dispose of appeal and cross-objections together by one judgment and such decision should be incorporated in one decree. This approach seeks to avoid contradictory and inconsistent decisions on the same questions in one and the same suit.<sup>185</sup>

### (r) Principles

The following principles govern cross-objections:<sup>186</sup>

- (1) An appeal is a substantive right. It is a creation of the statute. The right to appeal does not exist unless it is specifically conferred.
- (2) A cross-objection is like an appeal. It has all the trappings of an appeal. It is filed in the form of a memorandum and the provisions of Rule 1 of Order 41 of the Code, so far as these relate to the form and contents of the memorandum of an appeal, apply to a cross-objection as well.
- (3) Court fee is payable on a cross-objection like that on the memorandum of an appeal. Provisions relating to appeals by indigent persons also apply to cross-objections.
- (4) Even where an appeal is withdrawn or is dismissed for default, a cross-objection may nevertheless be heard and determined.
- (5) A respondent even though he has not appealed may support the decree on any other ground but if he wants to modify it, he has to file a cross-objection to the decree which objection he could have taken earlier by filing an appeal. The time for filing an objection which is in the nature of an appeal is extended by one month after service of notice on him of the day fixed for hearing the appeal. This time can also be extended by the Court like in an appeal.
- (6) A cross-objection is nothing but an appeal, a cross-appeal at that. It may be that the respondent wanted to give *quietus* to the whole litigation by his accepting the judgment and decree or order even if it was partly against his interest. When, however, the other party challenges the same by filing an appeal, the statute gives the respondent a second chance to file an appeal by way of a cross-objection if he still feels aggrieved by the judgment and decree or order.<sup>187</sup>

185. *Krishan Gopal v. Haji Mohd. Muslim*, AIR 1969 Del 126; *State of Kerala v. K K. Padmavathi*, (1984) 1 TAC 119; *State v. Salu*, AIR 1963 Raj 93.

186. *Superintending Engineer v. B. Subba Reddy*, (1999) 4 SCC 423. AIR 1999 SC 1747.

187. *Ibid*, at pp. 433-34 (SCC): at pp. 1753-54 (AIR) (*per* Wadhwa, J.).

#### 40. POWERS OF APPELLATE COURT: SECTION 107, RULES 23-29, 33

Sections 96-108 and Rules 23 to 33 of Order 41 enumerate the powers of an appellate court while hearing first appeals. They may be summarised thus:

##### (a) Power to decide a case finally: Section 107(1)(a), Rule 24

Section 107(1)(a) and Rule 24 of Order 41 enable the appellate court to dispose of a case finally. Where the evidence on record is sufficient to enable the appellate court to pronounce judgment, it may finally determine the case notwithstanding that the judgment of the trial court has proceeded wholly upon some ground other than that on which the appellate court proceeds. The general rule is that a case should, as far as possible, be disposed of on the evidence on record and should not be remanded for fresh evidence, except in rare cases<sup>188</sup>, by drawing the final curtain on the litigation between the parties.<sup>189</sup> Fragmentary decisions are most inconvenient and tend to delay the administration of justice.<sup>190</sup> "If life like a dome of many-coloured glass stains the white radiance of eternity, so do the doings and conflicts of mortal beings till death tramples them down."<sup>191</sup>

##### (b) Power to remand: Section 107(1)(b), Rules 23-23-A

###### (i) Meaning

Remand means to send back.

188. *Sunder Singh v. Narain Singh*, 1969 SCD 900; *Rajeshwar Rao v. Collector Hyderabad*, (1969) 2 SCWR 344, *Annamalai v. Narayanswami Pillai*, AIR 1972 Mad 316 at pp 318-19, *D Kaur v. Kantli Khare*, (1981) 4 SCC 152, AIR 1982 SC 789, *Nedunuri kameswaramma v. Sampati Subba Rao*, AIR 1963 SC 884, (1963) 2 SCR 208, *Patel Sureshbhai v. Patel Satabhai*, (1983) 3 SCC 294, AIR 1983 SC 648; *Kausalya Devi v. Land Acquisition Officer*, (1984) 2 SCC 324, AIR 1984 SC 892; *Bhairab Chandra v. Ranadhir Chandra*, (1968) 1 SCC 383; AIR 1968 SC 396

189. *Sant Narain v. Rama Krishna Mission*, (1974) 2 SCC 730 at p 737, AIR 1974 SC 2241 at p 2246, *Bechan Pandey v. Dulhin Janki Devi*, (1976) 2 SCC 286 at p 290, AIR 1976 SC 866 at p 869, *Chinnamarkathian v. Avyavoo*, (1982) 1 SCC 159 at p 170, AIR 1982 SC 137 at p 143, *Kausalya Devi Bogra v. Land Acquisition Officer*, (1984) 2 SCC 324 at p 334, *K Gopalan v. K Balakrishnan*, (2005) 12 SCC 351.

190. *Nanhelal v. Umrao Singh*, (1930-31) 58 IA 50, AIR 1931 PC 33, 130 IC 686

191. *Per Khanna, J* in *Bechan Pandey v. Dulhin Janki Devi* (1976) 2 SCC 286 at p 299, AIR 1976 SC 866 at p 869. See also, observations of Chief Justice Crewe quoted by His Lordship

**(ii) Nature**

Rule 23 of Order 41 of the Code enacts that where the trial court has decided the suit on a preliminary point without recording findings on other issues and the appellate court reverses the decree so passed, it may send back the case to the trial court to decide other issues and determine the suit. This is called remand.

Rule 23-A as inserted by the Amendment Act, 1976 enables the appellate court to remand a case where the lower court has decided it on merits but the appellate court considers such remand in the interest of justice.

**(iii) Scope**

By passing an order of remand, an appellate court directs the lower court to reopen and retry the case. On remand, the trial court will readmit the suit under its original number in the register of civil suits and will proceed to determine it as per the directions issued by the appellate court.<sup>192</sup>

**(iv) Conditions**

The appellate court has power to remand a case either under Rule 23 or under Rule 23-A. A remand cannot be ordered lightly.<sup>193</sup> It can be ordered only if the following conditions are satisfied:<sup>194</sup>

(1) *The suit must have been disposed of by the trial court on a preliminary point.*—Before the court can exercise the power of remand under Rule 23, it is necessary to show that the lower court has disposed of the suit on a preliminary point.

A point can be said to be a *preliminary point*, if it is such that the decision thereon in a particular way is sufficient to dispose of the whole suit, without the necessity for a decision on the other points in the case.<sup>195</sup>

192. R. 23.

193. *K. Krishna Reddy v. Collector, Land Acquisition*, (1988) 4 SCC 163; AIR 1988 SC 2123, *Bhairab Chandra Nandan v. Ranadhir Chandra Dutta*, (1988) 1 SCC 383; AIR 1988 SC 396, *Peria Nachi Muthu v. Raju Thevar*, (1985) 2 SCC 290; AIR 1985 SC 821; *Sunder Singh v. Narain Singh*, 1969 SCD 900; *Rajeshwar Rao v. Collector, Hyderabad*, (1969) 2 SCWR 344; *Kausalya Devi v. Land Acquisition Officer*, (1984) 2 SCC 324; AIR 1984 SC 892; *Thatchara Bros. v. M. K. Marymol*, (1999) 1 SCC 298.

194. *Mohd. Akbar Khan v. Motai*, AIR 1948 PC 36, *State v. Sanubhai*, (1970) 11 Guj LR 613, *Kalipada Dinda v. Kartick Chandra Hait*, AIR 1977 Cal 3.

195. *Malayath Veetil Raman v. C. Krishnan Nambudripad*, AIR 1922 Mad 505 at p. 508 (FB), *Chaudhary Chandrika Prasad v. Mithu Rai*, AIR 1927 Pat 296, *Bai Bai v. Mahadu Maruti*, AIR 1960 Bom 543 at p. 547; *D.P. Singh v. State of U.P.*, AIR 1973 All 174 at pp. 181-82.

Such preliminary point may be one of fact or of law, but the decision thereon must have avoided the necessity for a full hearing of the suit.

Thus, where the lower court dismisses the suit as being not maintainable, or barred by limitation; or *res judicata*; or as disclosing no cause of action; it does so on a preliminary point of law. On the other hand, where the lower court dismisses the suit on the ground that the plaintiff is estopped from proving his case; or that it was motivated; or that the plea raised at the hearing was different from that raised in the plaint, it does so on a preliminary point of fact.

(2) *The decree under appeal must have been reversed.*—No remand can be ordered by the appellate court under this rule unless the decision of the lower court on the preliminary point is reversed in appeal.<sup>196</sup>

Where such is not the case, the appellate court cannot order remand simply because the judgment of the lower court is not satisfactory; or that the lower court has misconceived or misread the evidence; or has ignored the important evidence; or has acted contrary to law; or that the materials on which the conclusion is reached are *scanty*; and the appellate court must decide the appeal in accordance with law.<sup>197</sup>

(3) *Other grounds.*—Rule 23-A of Order 41, as inserted by the Amendment Act of 1976, empowers the appellate court to remand a case even when the lower court has disposed of the case otherwise than on a preliminary point and the remand is considered necessary by the appellate court in the interests of justice.

The primary object of Rule 23-A is to widen the powers of the appellate court to remand a case in the interests of justice.<sup>198</sup> Even before the insertion of new Rule 23-A, it was held that an order of remand can be passed, if it is necessary to do so in the interests of justice.<sup>199</sup> But it was also held that the power of remand must be regulated by the provisions of Rules 23 and 25 of Order 41 and that inherent powers under Section 151 of the Code cannot be exercised by the appellate court to order remand.<sup>200</sup> The power of remand was, thus, strictly a limited power and yet in practice, many cases arose wherein remand was necessitated for

196. *Purapabutchi Rama v Purapa Vimalakumari*, AIR 1969 AP 216 at p. 220.

197. *Sunder Singh v. Narain Singh*, 1969 SCD 900, *Rajeshwar Rao v. Collector, Hyderabad*, (1969) 2 SCWR 344.

198. Statement of Objects and Reasons. See also *Ramesh Kumar v. Kesho Ram*, 1992 Supp (2) SCC 623, AIR 1992 SC 700, *Patel Sureshbhai v. Patel Satabhai*, (1983) 3 SCC 294, AIR 1983 SC 648, *Ashwinkumar K. Patel v. Upendra I. Patel*, (1999) 3 SCC 161, AIR 1999 SC 1125, *Ram Autar v. Director of Consolidation*, 1991 Supp (1) SCC 552, AIR 1991 SC 480, *Raghendra Bose v. Sunil Krishna*, (2005) 12 SCC 309, *Shanti Devi v. Daropti Devi*, (2006) 13 SCC 775.

199. *State of T.N. v. S. Kumaraswami*, (1977) 4 SCC 602 (III), AIR 1977 SC 2026, *Dwarka Nath v. Ram Rati Devi*, (1980) 1 SCC 17, AIR 1980 SC 192.

200. *Manendra Manilal v. Susma Mahendra*, AIR 1965 SC 364 at p. 399 (1964) 7 SCR 267, *Nain Singh v. Koonwarjee*, (1970) 1 SCC 732 at pp. 734-35, AIR 1970 SC 997 at p. 998.

some reasons other than those mentioned in Rules 23 and 25. The Law Commission<sup>201</sup>, therefore, recommended an amendment of the rule empowering the appellate court to remand a case whenever it thinks it is necessary in the interests of justice. The said recommendation has been accepted and Rule 23-A has accordingly been added.

#### (v) Effect

An order of remand reverses the decision of the lower court and reopens the case for retrial by the lower court except in regard to the matters decided by the appellate court.

An order of remand is appealable.<sup>202</sup> If the party aggrieved by an order of remand does not appeal therefrom, he cannot subsequently question its correctness under the inherent powers of the court under Section 151 of the Code.<sup>203</sup>

Similarly, the court to which the case is remanded is also bound by it and cannot go behind the order of remand.<sup>204</sup> While remanding the case, the appellate court shall fix a date for the appearance of the parties before the lower court so as to receive its directions regarding the suit or proceeding pending in the lower court.<sup>205</sup> It thus nullifies the order passed by the trial court.<sup>206</sup> It must, however be noted that when an appellate court remands a case setting aside findings of the lower court, only those findings can be said to have been set aside and not all the findings recorded by the trial court.<sup>207</sup>

201. Law Commission's Fourteenth Report, Vol. I at p. 405; Law Commission's Twenty-seventh Report at p. 241; Law Commission's Fifty-fourth Report at pp. 299-300.

202. Or. 43 R. 1(u).

203. S. 105(2). See also *Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati*, AIR 1965 SC 364; *Nain Singh v. Koonwarjee*, (1970) 1 SCC 732 at pp. 734-35. AIR 1970 SC 997 at p. 998; *Sita Ram v. Sukhnandi Dayal*, (1971) 3 SCC 488 at p. 494; AIR 1972 SC 1612 at p. 1617; *Jasraj Inder Singh v. Hemraj Multanchand*, (1977) 2 SCC 155 at p. 164; AIR 1977 SC 1011 at pp. 1017-18, *State of Maharashtra v. Harishchandra*, (1986) 3 SCC 349.

204. *Nain Singh v. Koonwarjee*, (1970) 1 SCC 732, *Bhopal Sugar Industries Ltd. v. ITO*, AIR 1961 SC 182 at p. 185 (1961) 1 SCR 474; *Tobacco Manufacturers (India) Ltd. v. CST*, AIR 1961 SC 402 at p. 405 (1961) 2 SCR 106; *CWT v. Aluminium Corpn Ltd.*, (1973) 3 SCC 643; (1972) 1 SCR 486, *Jasraj Inder Singh v. Hemraj Multanchand*, (1977) 2 SCC 155 at p. 164; AIR 1977 SC 1011 at pp. 1017-18, *Kausalya Devi v. Land Acquisition Officer*, (1984) 2 SCC 324 at pp. 333-34; AIR 1984 SC 892 at pp. 896-97; *Narinder Singh v. Surjit Singh*, (1984) 2 SCC 402; AIR 1984 SC 1359; *Cassell & Co. Ltd. v. Broome*, 1972 AC 1027 (1972) 2 WLR 645; (1972) 1 All ER 801 (HL).

205. R. 26-A.

206. *Kausalya Devi Bogra v. Land Acquisition Officer*, (1984) 2 SCC 324; AIR 1984 SC 892; *Mangal Prasad v. Narvadeshwar Mishra*, (2005) 3 SCC 422; AIR 2005 SC 1964.

207. *Mohan Lal v. Anandibai*, (1971) 1 SCC 813; AIR 1971 SC 2177.

**(vi) Duty of trial court**

Once an order of remand is made by a superior court, an inferior court has to decide the matter as per the direction of the superior court. In *CWT v. Aluminium Corpn. Ltd.*<sup>208</sup>, the High Court of Calcutta expressed "doubts" about the "competence" of the Supreme Court to remand the case. When the matter reached the Supreme Court again, the Apex Court observed that the High Court clearly exceeded its jurisdiction in examining the "competence" of the Apex Court to remand the case. It declared, "It would have done well to remind itself that it was bound by the orders of this Court and could not entertain or express any argument or views challenging their correctness. *The judicial tradition and propriety required that court not to sit on judgment over the decision and orders of this Court.*"<sup>209</sup> (emphasis supplied)

In *Shantilal v. Gujarat Electricity Board*<sup>210</sup>, three writ petitions were filed in the High Court. In two petitions, *vires* of a statutory provision was challenged. After the decision of the High Court, the matters were taken to the Supreme Court which remanded the cases to the High Court with a direction to decide *vires* of the provision. The High Court refused to try that issue in the third matter. The Apex Court held that the High Court was bound to decide *vires* in all matters.

**(vii) Conclusions**

The appellate court should not exercise the power of remand very lightly. As far as possible it should dispose of the appeal finally unless remand is imperative.<sup>211</sup> The correctness of an order of remand if not questioned at the time when it was made by filing an appeal, nevertheless can be challenged later on in an appeal arising out of the final judgment and decree.<sup>212</sup>

**(viii) Appeal**

An order passed under Rule 23 or 23-A of Order 41 is appealable.<sup>213</sup>

208. (1973) 3 SCC 643; (1972) 1 SCR 484.

209. *Ibid.* at p. 646 (SCC) (*per* Hegde, J.).

210. (1971) 3 SCC 854.

211. *K. Krishna Reddy v. Collector, Land Acquisition*, (1988) 4 SCC 163 AIR 1988 SC 2123, *Surendra Naram v. Prashidh Naram*, 1988 Supp SCC 171, *Bechan Pandey v. Dushin Janki Devi*, (1976) 2 SCC 286 AIR 1976 SC 866, *Patel Sureshbhai v. Patel Satanhai*, (1983) 3 SCC 294 AIR 1983 SC 648, *Ashwinkumar K. Patel v. Upendra J. Patel*, (1999) 3 SCC 161 AIR 1999 SC 1125, *Gangadharan v. Janardhana Mallan*, (1996) 9 SCC 53 AIR 1996 SC 2127, *J. Lingaiah v. G. Hanumanthappa*, (2001) 10 SCC 751.

212. *Jasrajinder Singh v. Hemraj Multan Chand* (1977) 2 SCC 155 AIR 1977 SC 1011, *Sukhrani v. Hari Shanker* (1979) 2 SCC 463 AIR 1979 SC 1436, *Margaret v. Indo Commercial Bank Ltd.* (1979) 2 SCC 396 AIR 1979 SC 102.

213. Or. 43 R. 100; see also *infra*, Chap. 4.

(c) Power to frame issues and refer them for trial: Section 107(1)(c), Rules 25-26

(i) Scope

Where the lower court has omitted (i) to frame any issue; or (ii) to try any issue; or (iii) to determine any question of fact, which is essential to the right decision of the suit upon merits, the appellate court may frame issues and refer them for trial to the lower court and shall direct that court to take the additional evidence required. The lower court shall try such issues and shall return the evidence and the findings within the time fixed by the appellate court.<sup>214</sup>

(ii) Effect

Such evidence and findings shall form part of the record in the suit, and either party may file in the appellate court a memorandum of objections to any such finding of the lower court within a time fixed by the appellate court.<sup>215</sup> The appellate court should, thereafter, hear the whole appeal and the hearing should not be confined to the points on which the findings were called for.<sup>216</sup>

(iii) Rules 23, 23-A, 25: Distinction

The points of distinction between Rules 23, 23-A and Rule 25 are as under:

- (1) While after remand under Rules 23 or 23-A, the *whole case* goes back for decision to the lower court (except on the point on which the appellate court has reversed the finding of the lower court), under Rule 25 the case is retained in the file of the appellate court and only *issues* are remitted to the lower court for trial and findings thereon.
- (2) An order of remand under Rules 23, 23-A is a *final order* which cannot be reconsidered by the court which passed it except on review, while an order under Rule 25 is an *interlocutory order* which is open to be reconsidered by the court which has passed it.
- (3) Whereas an order under Rules 23, 23-A is appealable, an order under Rule 25 is not appealable.

214. S. 107(1)(c), Or. 41 R. 25. See also *Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati*, AIR 1965 SC 364, *Pasupuleti Venkateswarlu v. Motor & General Traders*, (1975) 1 SCC 770; AIR 1975 SC 1409.

215. R. 26.

216. *Gogula Gurumurthy v. Kurimeti Ayyappa*, (1975) 4 SCC 458; AIR 1974 SC 1702 at p. 1703; *Soundararaj v. Devasahayam*, 1984 Supp SCC 235; AIR 1984 SC 133.

(d) Power to take additional evidence:

Section 107(1)(d), Rules 27-29

(i) General

As a general rule, the appellate court shall decide an appeal on the evidence led by the parties before the trial court and should not admit additional evidence for the purpose of disposal of an appeal.<sup>217</sup> Sub-rule (1) of Rule 27 also reads thus, "The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court."

Section 107(1)(d), however, is an exception to the general rule, and empowers an appellate court to take additional evidence or require such evidence to be taken subject to the conditions laid down in Rule 27 of Order 41.<sup>218</sup>

(ii) Meaning

The term "additional evidence" does not mean evidence over and above the evidence led by the party in the lower court. Such a view would be introducing an additional condition not contemplated by the Code. There should be no distinction between a party who has led some evidence and a party who has not led evidence at all. All that is required is that the conditions laid down in the Code for leading of additional evidence must be fulfilled.<sup>219</sup>

(iii) Object

The basic principle of admission of additional evidence is that the person seeking the admission of additional evidence should be able to establish that with the best efforts such additional evidence could not have been adduced at the first instance. Secondly, the party affected by the admission of additional evidence should have an opportunity to rebut such additional evidence. Thirdly, the additional evidence must be relevant for the determination of the issue.<sup>220</sup>

217. *Municipal Corpn. of Greater Bombay v Lala Pancham*, AIR 1965 SC 1008 at p 1012 (1965) 1 SCR 542, *Soonda Ram v. Rameshwarlal*, (1975) 3 SCC 608 at p 609 AIR 1975 SC 479 at p. 480, *K Venkataramiah v. A Seetharama Reddy*, AIR 1963 SC 1526 at p 1528 (1964) 2 SCR 35

218. *K Venkataramiah v A Seetharama Reddy*, AIR 1963 SC 1526

219. *Jaipur Development Authority v Karlashwati Devi*, (1997) 7 SCC 297 AIR 1997 SC 3243

220. *Shivapraso Nilangekar v Mahesh Madhav*, (1987) 1 SCC 227. *N Kamalam v Arayasamy*, (2001) 7 SCC 503.

(iv) Nature and scope

When a party is unable to produce the evidence in the trial court under the circumstances mentioned in the Code, he should be allowed to produce the same in an appellate court. The power is discretionary and should be exercised on sound judicial principles and in the interests of justice.<sup>221</sup>

(v) Circumstances

Rule 27 enumerates the circumstances in which the appellate court may admit additional evidence, whether oral or documentary, in appeal. They are as under:<sup>222</sup>

- (1) Where the lower court has improperly refused to admit evidence which ought to have been admitted; or
- (2) Where such additional evidence was not within the knowledge of the party or could not, after exercise of due diligence, be produced by him at the time when the lower court passed the decree; or
- (3) Where the appellate court itself requires such evidence either (a) to enable it to pronounce judgment; or (b) for any other substantial cause.

In *Shivajirao Nilangekar v. Mahesh Madhav*<sup>223</sup>, the Supreme Court stated, "The basic principle of admission of additional evidence is that the person seeking the admission of additional evidence should be able to establish that with the best efforts such additional evidence could not have been adduced at the first instance. Secondly, the party affected by the admission of additional evidence should have an opportunity to rebut such additional evidence. Thirdly, that additional evidence was relevant for the determination of the issue."

In *K.R. Mohan Reddy v. Net Work INC*<sup>224</sup>, the Supreme Court stated that clauses (a), (aa) and (b) of Rule 27(1) refer to three different situations. For exercising jurisdiction thereunder, the appellate court must record a finding that one or the other conditions of Rule 27(1) is satisfied.

(A) *Improper refusal to admit evidence.*—Where the lower court has refused to admit evidence which was tendered and which ought to have been admitted, the appellate court may admit such evidence at

221. *Jaipur Development Authority v. Kailashwati Devi*, (1997) 7 SCC 297; AIR 1997 SC 3243; *Arjan Singh v. Kartar Singh*, AIR 1951 SC 193; 1951 SCR 258; *Natha Singh v. Financial Commr.*, (1976) 3 SCC 28; AIR 1976 SC 1053; *Mahavir Singh v. Naresh Chandra*, (2001) 1 SCC 309; AIR 2001 SC 134.

222. R. 27(1)(a), (aa), (b).

223. (1987) 1 SCC 227.

224. (2007) 14 SCC 257; AIR 2008 SC 579.

the appellate stage.<sup>225</sup> The expression *ought to have been admitted* means *should be admitted in the exercise of sound discretion*.<sup>226</sup> The appellate court, therefore, before admitting additional evidence must be satisfied that the trial court was unjustified in refusing to admit such evidence.

Thus, where the lower court has refused to take certain evidence on the ground of its late production, such rejection cannot be said to be unjustified and the appellate court should not interfere with the discretion of the lower court and admit such evidence.<sup>227</sup>

(B) *Discovery of new evidence*.—Clause (aa) of sub-rule (1) of Rule 27, inserted by the Amendment Act of 1976, empowers the appellate court to receive additional evidence at the appellate stage if the party seeking to produce additional evidence satisfies the court that, in spite of the exercise of due diligence, such evidence was not within his knowledge or could not be produced by him when the decree was passed against him.<sup>228</sup>

One of the basic principles for admission of additional evidence is that the person seeking admission of additional evidence should establish that in spite of due diligence such evidence could not be produced at the first instance.<sup>229</sup> The provision, however, is not confined to cases where the parties have adduced some evidence in the lower court. Even if he has not adduced any evidence before the trial court, additional evidence can be permitted by the appellate court if the conditions laid down in clause (aa) of Rule 27(1) of Order 41 are satisfied.<sup>230</sup>

(C) *Requirement by appellate court*.—The appellate court may itself require additional evidence for either of the two purposes: (a) to enable it to pronounce judgment; or (b) for any other substantial cause.<sup>231</sup>

225. *Official Liquidator v. Raghawa Desikachar*, (1974) 2 SCC 741 at pp. 746-47. AIR 1974 SC 2069 at pp. 2073-74; *Shivajirao Nilangekar v. Mahesh Madhav*, (1987) 1 SCC 227.

226. *Sumitra v. Maharaju*, AIR 1963 HP 21 at p. 23; *Arjan Singh v. Kartar Singh*, AIR 1951 SC 193 at p. 195; 1951 SCR 258; *Natha Singh v. Financial Commr.*, (1976) 3 SCC 28 at p. 31; AIR 1976 SC 1053 at pp. 1056-57.

227. *Pramod Kumari v. Om Prakash*, (1980) 1 SCC 412 at p. 416; AIR 1980 SC 446 at p. 448, *Roop Chand v. Gopi Chand*, (1989) 2 SCC 383, *Shiv Chander v. Amar Bose*, (1990) 1 SCC 234; AIR 1990 SC 325.

228. *Shivajirao Nilangekar v. Mahesh Madhav*, (1987) 1 SCC 227; *Shiv Chander Kapoor v. Amar Bose*, (1990) 1 SCC 234; AIR 1990 SC 325, *Pramod Kumari Bhatia v. Om Prakash Bhatia*, (1980) 1 SCC 412; AIR 1980 SC 446, *State of A P v. Kalva Suryanarayana*, (1992) 2 SCC 732; AIR 1992 SC 797; *Hindustan Brown Boveri Ltd v. Workmen*, (1968) 1 LJ 571 (1968) 16 FLR 325 (SC); *Yudhistir v. Ashok Kumar*, (1987) 1 SCC 204; AIR 1987 SC 558, *Haryana State Industrial Development Corpn v. Cork Mfg Co.*, (2007) 8 SCC 120.

229. *Shivajirao Nilangekar Patil v. Dr. Mahesh Madhav Gosavi*, (1987) 1 SCC 227 at p. 243; AIR 1987 SC 294 at p. 304.

230. *Jaipur Development Authority v. Kailashwati Devi*, (1997) 7 SCC 207; AIR 1997 SC 3243.

231. *Arjan Singh v. Kartar Singh*, AIR 1951 SC 193; 1951 SCR 258; *Kamala Raman v. Bainath Bajoria*, AIR 1951 SC 1; 1950 SCR 840, *Yudhistir v. Ashok Kumar* (1987) 1 SCC 204; AIR 1987 SC 558, *Sarada v. Manikkoth Kombra*, (1996) 8 SCC 345, *City Improvement Trust Board v. H. Narayanaiah*, (1976) 4 SCC 9; AIR 1976 SC 2403. *Natha Singh v. Financial*

The requirement must be of the appellate court. "The legitimate occasion for the application of the present rule is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made outside the court of such evidence and the application is made to import it."<sup>232</sup> Thus, subsequent events can be considered by the court.<sup>233</sup> But a matter cannot be remanded for allowing a party to adduce additional evidence when such evidence was available and yet not produced in the lower court.<sup>234</sup>

The true test, therefore, is whether the appellate court is able to pronounce judgment on the material before it without taking into consideration the additional evidence sought to be adduced.<sup>235</sup>

Similarly, the appellate court may admit additional evidence "for any sufficient cause". An application of additional evidence must be disposed of before pronouncing judgment.<sup>236</sup> The expression *any substantial cause* should be liberally construed so as to advance substantial justice between the parties.<sup>237</sup> Thus, the additional evidence may be required to enable the court to pronounce judgment; or for any other substantial cause, but, in either case, it must be the court which requires it.<sup>238</sup> A mere difficulty in coming to a decision is not sufficient for admission of evidence under Rule 27.

The words "for any other substantial cause" must be read with the word "requires" which is set out at the commencement of the provision, so that it is only where, for any other substantial cause, the appellate court requires additional evidence, that this rule will apply.<sup>239</sup> The defect may be pointed out by a party, or that a party may move the court to supply the defect, but the requirement must be the requirement of the court upon its appreciation of the evidence as it stands.<sup>240</sup>

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*Commr.*, (1976) 3 SCC 28; AIR 1976 SC 1053; *Billa Jagan Mohan v. Billa Sanjeeva*, (1994) 4 SCC 659; *Mahavir Singh v. Naresh Chandra*, (2001) 1 SCC 309; AIR 2001 SC 134; *State of Gujarat v. Mahendrakumar*, (2006) 9 SCC 772; AIR 2006 SC 1864.

232. *Kessowji Issur v. Great Indian Peninsula Railway Co.*, (1906-07) 34 IA 115 (PC); ILR (1907) 31 Bom 381 (PC); *Arjan Singh v. Kartar Singh*, AIR 1951 SC 193.

233. *Gulabhai v. Nalin Narsi Vohra*, (1991) 3 SCC 483; AIR 1991 SC 1760.

234. *Koyappathodi M. Ayisha v. State of Kerala*, (1991) 4 SCC 8 at p. 11; AIR 1991 SC 2027.

235. *Arjan Singh v. Kartar Singh*, AIR 1951 SC 193; *Natha Singh v. Financial Commr.*, (1976) 3 SCC 28.

236. *Premier Automobiles Ltd. v. Kabirunissa*, 1991 Supp (2) SCC 282; AIR 1991 SC 91; *State of Rajasthan v. T.N. Sahani*, (2001) 10 SCC 619; *Sanjiv Goel v. Avtar S. Sandhu*, (2006) 9 SCC 748.

237. *K. Venkataramiah v. A. Seetharama Reddy*, AIR 1963 SC 1526 at p. 1530 (AIR), *State of U P. v. Manbodhan Lal*, AIR 1957 SC 912 at p. 915; 1958 SCR 533.

238. *Ibid*, see also *Arjan Singh v. Kartar Singh*, AIR 1951 SC 193; 1951 SCR 258.

239. *Mahavir Singh v. Naresh Chandra*, (2001) 1 SCC 309; AIR 2001 SC 134; *Billa Jagan Mohan v. Billa Sanjeeva*, (1994) 4 SCC 659; *Sunder Lal & Sons v. Bharat Handicrafts (P) Ltd.*, AIR 1968 SC 406. (1968) 1 SCR 608.

240. *K. Venkataramiah v. A. Seetharama Reddy*, AIR 1963 SC 1526.

The provisions of Rule 27 are not intended to allow a litigant who has been unsuccessful in the lower court to patch up the weak parts of his case and to fill in gaps.<sup>241</sup> The expression "to enable it (appellate court) to pronounce judgment" means when the appellate court finds itself unable to pronounce judgment owing to a lacuna or defect in the evidence as it stands. The ability to pronounce judgment is to be understood as the ability to pronounce a judgment satisfactory to the mind of the court delivering it.<sup>242</sup>

The provisions of Rule 27 have not been engrafted in the Code so as to patch up weak points by the party in the case and to fill up the omission in the court of appeal. It does not authorise any lacunae or gaps in evidence by a party to be filled up. The authority and jurisdiction as conferred on the appellate court to allow fresh evidence is restricted.<sup>243</sup> *It does not entitle the appellate court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way.*<sup>244</sup> (emphasis supplied)

#### (vi) Recording of reasons

Whenever the appellate court admits additional evidence, it should record reasons for doing it.<sup>245</sup> The underlying object of this provision is to keep a clear record of what weighed with the appellate court in allowing the additional evidence to be produced.<sup>246</sup> As observed by their Lordships of the Privy Council, "It is a salutary provision, which operates as a check against a too easy reception of evidence at a late stage of the litigation, and the statement of the reasons may inspire confidence and disarm objection."<sup>247</sup>

Again, where a further appeal lies from the decision of the appellate court, recording of reasons is necessary so as to enable the higher court to decide whether the discretion under the rule has been judicially

241. *State of U.P. v. Manbodhan Lal*, AIR 1957 SC 912; *Maganlal v. Mulchand*, 1969 UJSC 654; *Sunder Lal & Sons v. Bharat Handicrafts (P) Ltd.*, AIR 1968 SC 406 at p. 409. (1968) 1 SCR 608.

242. *Mahavir Singh v. Naresh Chandra*, (2001) 1 SCC 309; AIR 2001 SC 134; *Syed Abdul Khader v. Ram Reddy*, (1979) 2 SCC 601; AIR 1979 SC 553; *Municipal Corpn. of Greater Bombay v. Lala Pancham*, AIR 1965 SC 1008; (1965) 1 SCR 542.

243. *N. Kamalam v. Ayyasamy*, (2001) 7 SCC 503.

244. *Municipal Corpn. of Greater Bombay v. Lala Pancham*, AIR 1965 SC 1008 at p. 1012 (AIR); *Syed Abdul Khader v. Ram Reddy*, (1979) 2 SCC 601; AIR 1979 SC 553. *N. Kamalam v. Ayyasamy*, (2001) 7 SCC 503.

245. R. 27(2). See also *K. Venkataramiah v. A. Seetharama Reddy*, AIR 1963 SC 1526 at p. 1529 (AIR); *City Improvement Trust Board v. H. Narayanaiah*, (1976) 4 SCC 9 at p. 20; AIR 1976 SC 2403 at p. 2414.

246. *K. Venkataramiah v. A. Seetharama Reddy*, AIR 1963 SC 1526 at p. 1527.

247. *Gunga Gobind Mundul v. Collector of the Twenty-four Pergunnahs*, (1867) 11 MIA 345 at p. 368 (PC), see also *Hurpurshad v. Sheo Dyal*, (1875-76) 3 IA 259, *Manmohan Das v. Ramdei*, AIR 1931 PC 175.

exercised by the court below.<sup>248</sup> The omission to record reasons, therefore, must be treated as a serious defect.<sup>249</sup> The provision, however, is directory and not mandatory, and failure to record reasons does not make the evidence inadmissible if the reception of such evidence is otherwise justified under the rule.<sup>250</sup>

#### (vii) Mode of taking additional evidence

Rules 28 and 29 lay down the mode of taking additional evidence when the appellate court admits additional evidence in appeal. The appellate court may take the evidence itself or direct the lower court from whose decree the appeal is preferred or any other subordinate court to take it.<sup>251</sup> Where the appellate court directs the lower court to record evidence, it should retain the appeal on its file and dispose it of on receipt of the additional evidence.<sup>252</sup>

#### (e) Power to modify decree: Rule 33<sup>253</sup>

##### (i) General

Rule 33 of Order 41 empowers an appellate court to make whatever order it thinks fit, not only as between the appellant and the respondent but also as between one respondent and another respondent. It empowers an appellate court not only to give or refuse relief to the appellant by allowing or dismissing the appeal, but also to give such other relief to any of the respondents as the case may require.<sup>254</sup>

248. *K. Venkataramiah v. A. Seetharama Reddy*, AIR 1963 SC 1526.

249. *Mahant Dhangir v. Madan Mohan*, 1987 Supp SCC 528 at pp. 534-35; AIR 1988 SC 54 at p. 58, *Chaya v. Bapusaheb*, (1994) 2 SCC 41; *K. Muthuswami v. N. Palaniappa*, (1998) 7 SCC 327; AIR 1998 SC 3118; see also *Tummalla Atchiah v. Venka Narasingarao*, (1979) 1 SCC 166; AIR 1978 SC 725.

250. *Ibid.*, see also *Venkataramiah v. Seetharama Reddy*, AIR 1963 SC 1526.

251. R. 28.

252. R. 29, see also *A.P. State Wakf Board v. All-India Shia Conference (Branch)*, (2000) 3 SCC 528; AIR 2000 SC 1751.

253. R. 33 Or. 41 reads as under:

"33. *Power of Court of Appeal.*—The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees."

254. *Rameshwar Prasad v. Shambehari Lal*, AIR 1963 SC 1901; (1964) 3 SCR 549, *Panna Lal v. State of Bombay*, AIR 1963 SC 1516; (1964) 1 SCR 980, *Nirmala Bala v. Balai Chand*,

**(ii) Illustrations**

(i) A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X appeals and A and Y are respondents. The appellate court decides in favour of X. It has power to pass a decree against Y.

(ii) A claims a sum of money as due to him from X or Y. The suit is decreed partly against X and partly against Y. X appeals but Y does not. The appellate court can discharge X making Y liable for the whole amount.

**(iii) Object**

The underlying object of Rule 33 is to enable the appellate court to do full and complete justice between the parties. It is true that the power of the appellate court is discretionary. But it is a proper exercise of judicial discretion to determine all questions in order to render full justice to the parties. The court should not refuse to exercise the discretion on mere technicalities.<sup>255</sup> No hard and fast rule can be laid down as to the circumstances in which the power of Rule 33 may or may not be exercised and each case must depend on its own facts.<sup>256</sup>

**(iv) Rules 22, 33: Distinction**

Generally, cross-objections under Rule 22 of Order 41 can be directed only against the appellant and only in exceptional cases can they be filed by one respondent against the other respondent. The provisions of Rule 33 dealing with the power of the appellate court to grant relief to parties to a suit who have not appealed or filed cross objections, on the other hand, enable the court to make any order as the case may require to meet the ends of justice not only between the appellant and respondent but also between a respondent and co-respondent.<sup>257</sup>

AIR 1965 SC 1874; (1965) 3 SCR 550; *Giani Ram v. Ramjilal*, (1969) 1 SCC 813; AIR 1969 SC 1144; *Ramchand v. Janki Ballabhji Maharaj*, (1969) 2 SCC 313; AIR 1970 SC 532; *Ramgaya Prasad v. Murlī Prasad*, (1973) 2 SCC 9; AIR 1972 SC 1181; *Koksingh v. Deokabai*, (1976) 1 SCC 383; AIR 1976 SC 634; *Choudhary Sahu v. State of Bihar*, (1982) 1 SCC 232 at pp. 235-37; AIR 1982 SC 98 at pp. 99-100; *Bihar Supply Syndicate v. Asiatic Navigation*, (1993) 2 SCC 639 at pp. 650-51; *Shankar Popat Hiranman Umapai*, (2003) 4 SCC 100; AIR 2003 SC 1682.

255. *Mahant Dhangir v. Madan Mohan*, 1987 Supp SCC 528 at pp. 534-35; AIR 1988 SC 54 at p. 58; *Chaya v. Bapusaheb*, (1994) 2 SCC 41; *K. Muthuswami v. N. Palaniappa*, (1998) 7 SCC 327; AIR 1998 SC 3118.

256. *Ibid.*, see also *Tummalla Atchaiah v. Venka Narasingarao*, (1979) 1 SCC 166; AIR 1978 SC 725.

257. *Panna Lal v. State of Bombay*, AIR 1963 SC 1516 (1964) 1 SCR 980; *Mahant Dhangir v. Madan Mohan*, 1987 Supp SCC 528; AIR 1988 SC 54; *Bihar Supply Syndicate v. Asiatic Navigation*, (1993) 2 SCC 639; AIR 1993 SC 2054; *Narayanarao v. Sudarshan*, 1995 Supp

In *Panna Lal v. State of Bombay*<sup>258</sup>, after reviewing several decisions, the Supreme Court stated, "(T)he legislature wanted to give effect to the views held by the different High Courts that in exceptional cases as mentioned above an objection can be preferred by a respondent against a co-respondent is indicated by the substitution of the word 'appellant' in the third paragraph by the words 'the party who may be affected by such objection'."

If the cross-objection filed under Rule 22 of Order 41, CPC was not maintainable against the co-respondent, the court could consider it under Rule 33 of Order 41, CPC. Rule 22 and Rule 33 are not mutually exclusive. They are closely related with each other. If an objection cannot be urged under Rule 22 against a co-respondent, Rule 33 could take over and come to the rescue of the objector. The appellate court could exercise the power under Rule 33 even if the appeal is only against a part of the decree of the lower court. The appellate court could exercise that power in favour of all or any of the respondents although such respondent may not have filed any appeal or cross-objection. The sweep of the power under Rule 33 is wide enough to determine any question, not only between an appellant and respondent, but also between a respondent and co-respondents. The appellate court could pass any decree or order which ought to have been passed in the circumstances of the case. The appellate court could also pass such other decree or order as the case may require. The words "as the case may require" used in Rule 33 of Order 41 have been put in wide terms to enable the appellate court to pass any order or decree to meet the ends of justice.<sup>259</sup>

#### (v) Conditions

The language of Rule 33 is very wide. The following requirements, however, must be satisfied before it can be invoked:

- (1) The parties before the lower court must also be there before the appellate court; and
- (2) The question raised must have properly arisen out of the judgment of the lower court.

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(4) SCC 463; *S. Nazeer Ahmed v. State Bank of Mysore*, (2007) 11 SCC 75: AIR 2007 SC 989.

258. AIR 1963 SC 1516: (1964) 1 SCR 980.

259. *Mahant Dhangir v. Madan Mohan*, 1987 Supp SCC 528: AIR 1988 SC 54; see also *Bihar Supply Syndicate v. Asiatic Navigation*, (1993) 2 SCC 639 at p. 651 (SCC), *Chaya v. Bapusaheb*, (1994) 2 SCC 41; *Chunilal v. H.K. Adhyaru*, AIR 1956 SC 655. (1956) 26 Comp Cas 168; *Kanaya Ram v. Rajender Kumar*, (1985) 1 SCC 436. AIR 1985 SC 371; *Shadi Singh v. Rakha*, (1992) 3 SCC 55: AIR 1994 SC 800; *Syed Asadullah v. ADJ, Allahabad*, (1981) 3 SCC 483. AIR 1981 SC 1724; *Laxmi & Co. v. Dr. Anant R. Deshpande*, (1973) 1 SCC 37: AIR 1973 SC 171; *Mithulesh Kumari v. Prem Behari*, (1989) 2 SCC 95: AIR 1989 SC 1247.

If these conditions are fulfilled, the appellate court can consider any objection against any part of the judgment or decree of the lower court. It may be urged by any party to the appeal.<sup>260</sup>

#### (vi) Ambit and scope

The sweep of power under Rule 33 is wide enough to determine any question not only between the appellant and the respondent but also between the respondent and co-respondents. The appellate court can pass any decree or order which ought to have been passed in the facts and circumstances of the case. The words "as the case may require" used in Rule 33 enable the appellate court to pass any order or decree to meet the ends of justice.<sup>261</sup> The only constraint on the power of the court is that the parties before the lower court should also be there before the appellate court.

#### (vii) Limitations

Though Rule 33 is expressed in very wide terms, it has to be applied with care and caution and to cases where interference in favour of the appellant necessitates interference also with a decree which has by acceptance or acquiescence become final so as to enable the court to adjust the rights of the parties.<sup>262</sup> The rule does not confer unrestricted right to reopen decrees which have become final merely because the appellate court does not agree with the opinion of the trial court.<sup>263</sup> Nor the appellate court will interfere with finding of fact.<sup>264</sup> Again, the discretionary power cannot be exercised to nullify the effect of the abatement of appeal.<sup>265</sup>

As the power under this rule is in derogation of the general principle that a party cannot avoid a decree against him without filing an appeal or objection, it must be exercised with care and caution. The Rule does not confer an unrestricted right to reopen decrees which have become final merely because the appellate court does not agree with the opinion of the court appealed from. While exercising powers under this

260. *Mahant Dhangir v. Madan Mohan*, 1987 Supp SCC 528 at pp. 534-35 AIR 1988 SC 54 at p. 57; *K. Muthuswami v. N. Palaniappa*, (1998) 7 SCC 327 AIR 1998 SC 3118

261. *Rameshwar Prasad v. Shambahari Lal*, AIR 1963 SC 1901, *Mahant Dhangir v. Madan Mohan*, 1987 Supp SCC 5281.

262. *Ibid*, see also *Nirmala Bala v. Balai Chand*, AIR 1965 SC 1874 at p. 1884 (AIR); *Choudhary Sahu v. State of Bihar*, (1982) 1 SCC 232 at p. 235 AIR 1982 SC 98 at p. 99

263. *Nirmala Bala Ghose v. Balai Chand Ghose*, AIR 1965 SC 1874, *State of Punjab v. Bakshish Singh*, (1998) 8 SCC 222 AIR 1999 SC 2626

264. *Sarju Pershad v. Jwaleshwari Pratap*, AIR 1951 SC 120; 1950 SCR 781, *Mohd. Salamatullah v. Govt. of A.P.*, (1977) 3 SCC 590; AIR 1977 SC 1481

265. *Rameshwar Prasad v. Shambahari Lal*, AIR 1963 SC 1901 at p. 1877 (AIR), *Harihar Prasad v. Balmiki Prasad*, (1975) 1 SCC 212 AIR 1975 SC 733.

Rule the court should not lose sight of other provisions of the Code itself nor the provisions of other laws, viz. the law of limitation or the law of court fees, etc.<sup>266</sup>

Moreover, such power cannot be exercised without issuing notice and affording an opportunity to the party likely to be affected.<sup>267</sup> The expression "which ought to have been passed" means "which ought in law to have been passed".<sup>268</sup> *Such a power is to be exercised in exceptional cases when its non-exercise will lead to difficulties in the adjustment of rights of the various parties.*<sup>269</sup> (emphasis supplied)

### (viii) Conclusions

It is submitted that the following observations of Shah, J. (as he then was) in *Nirmala Bala Ghose v. Balai Chand Ghose*<sup>270</sup>, lay down correct law on the point and, therefore, are worth quoting:

"The rule is undoubtedly expressed in terms which are wide, but it has to be applied with discretion, and to cases where interference in favour of the appellant necessitates interference also with a decree which has by acceptance or acquiescence become final so as to enable the Court to adjust the rights of the parties. Where in an appeal the Court reaches a conclusion which is inconsistent with the opinion of the Court appealed from and in adjusting the right claimed by the appellant it is necessary to grant relief to a person who has not appealed, the power conferred by Order 41 Rule 33 may properly be invoked. *The rule however does not confer an unrestricted right to reopen decrees which have become final merely because the appellate court does not agree with the opinion of the Court appealed from.*"<sup>271</sup>

(emphasis supplied)

### (f) Other powers: Section 107(2)

Section 107(2) of the Code enacts that over and above the aforesaid powers, an appellate court has the same powers as an original court. This provision is based on the general principle that an appeal is a continuation of a suit and therefore, an appellate court can do, while the

266. *Choudhary Sahu v. State of Bihar*, (1982) 1 SCC 232 at p. 235; AIR 1982 SC 98 at p. 99; *State of Punjab v. Bakshish Singh*, (1998) 8 SCC 222.

267. *Trimbak Narayan v. Babulal Motaji*, (1973) 2 SCC 154; AIR 1973 SC 1363.

268. *Giani Ram v. Ramjilal*, (1969) 1 SCC 813; AIR 1969 SC 1144 at p. 1147; *Nirmala Bala Ghose v. Balai Chand Ghose*, AIR 1965 SC 1874 at p. 1877 (AIR); *Shankar Popat v. Hiranman Umaji*, (2003) 4 SCC 100; AIR 2003 SC 1682.

269. *Rameshwar Prasad v. Shambahari Lal Jagannath*, AIR 1963 SC 1901; (1964) 3 SCR 549; see also *Harihar Prasad Singh v. Balmiki Prasad Singh*, (1975) 1 SCC 212; AIR 1975 SC 733.

270. AIR 1965 SC 1874; (1965) 3 SCR 550.

271. *Ibid.* at p. 1874 (AIR); see also *Bihar Supply Syndicate v. Asiatic Navigation*, (1993) 2 SCC 639.

appeal is pending, what the original court could have done while the suit is pending.<sup>272</sup>

Thus, an appellate court is empowered to reappraise the evidence, to add, transpose or substitute the parties, to permit the withdrawal of proceedings, to return a plaint or memorandum of appeal for presentation to the proper court, to allow amendments in pleadings, to take notice of subsequent events, to take into consideration a change in law and to apply the existing or changed law, to order restitution, to enlarge time for doing certain acts, etc.<sup>273</sup>

#### 41. DUTIES OF APPELLATE COURT

It should not, however, be forgotten that the powers of an appellate court are not absolute or uncontrolled. The Code also imposes certain duties on appellate courts and the court has to decide appeals keeping in mind these duties. These duties are as follows:

##### (a) Duty to decide appeal finally

It is the duty of the appellate court to decide an appeal in accordance with law after considering the evidence as a whole. The judgment of the appellate court must clearly show that it has applied its judicial mind to the evidence as a whole.<sup>274</sup>

##### (b) Duty not to interfere with decree for technical errors

Section 99 of the Code enacts that a decree which is otherwise correct on merits and is within the jurisdiction of the court should not be upset merely for technical and immaterial defects. The underlying object of

272. *R S. Lala Praduman v. Virendra Goyal*, (1969) 1 SCC 714 at p 717; AIR 1969 SC 1349 at p. 1351; *Nair Service Society Ltd. v. K C Alexander*, AIR 1968 SC 1165 at p 1178; (1968) 3 SCR 163; *Ramankutty Guptan v. Avara*, (1994) 2 SCC 642 at p. 645; AIR 1994 SC 1699. For detailed discussion, see *supra*, "Suit and appeal".

273. *Ibid*. See also *Qudrat Ullah v. Municipal Board, Bareilly*, (1974) 1 SCC 202 at p 217; AIR 1974 SC 396 at p 404; *Narhari Shitram v. Pannalal Umediram*, (1976) 3 SCC 203 at p 209; AIR 1977 SC 164 at p 169; *Bai Dosabai v. Mathurdas Govinddas* (1980) 3 SCC 545 at pp. 552-53; AIR 1980 SC 1334 at pp 1339-40; *M M Quasim v. Manohar Lal*, (1981) 3 SCC 36; AIR 1981 SC 1113, S 144. See also *infra*, Pt V, Chap 2 S. 148. See also *infra* Pt V, Chap 4, *Ramesh Kumar v. Kesho Ram*, 1992 Supp (2) SCC 623; AIR 1992 SC 700. For detailed discussion and case law, see, *Authors' Code of Civil Procedure (Lawyers' Edn)* Vol II at pp 456-66.

274. *State of T N v S. Kumaraswami*, (1977) 4 SCC 602 (III); AIR 1977 SC 2026. For detailed discussion see *supra* "Power to decide a case finally".

Section 99 is "to prevent technicalities from overcoming the ends of justice, and from operating as a means of circuitry of litigation".<sup>275</sup>

As observed by the Supreme Court,<sup>276</sup> "When a case has been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it has resulted in failure of justice."

### (c) Duty to reappreciate evidence

As seen above, an appeal is a continuation of a suit. Inasmuch as an appeal is a rehearing of the matter, the appellate court can reappreciate the entire evidence, oral as well as documentary, and can arrive at its own conclusion. At the same time, however, the appellate court will bear in mind a finding recorded by the trial court on oral evidence. It should not forget that the trial court had the advantage and opportunity of watching the demeanour of witnesses and, hence, the trial court's conclusions should not normally be disturbed. No doubt, the appellate court has the same powers as the original court, but they have to be exercised with proper care, caution and circumspection. When a finding of fact has been arrived at by the trial court by mainly appreciating oral evidence, it should not be lightly disturbed unless the approach of the trial court in appraisal of evidence is materially erroneous, contrary to well-established principles or perverse.<sup>277</sup>

In *T.D. Gopalan v. Hindu Religious & Charitable Endowments*<sup>278</sup>, the Supreme Court observed, "We apprehend that the uniform practice in the matter of appreciation of evidence has been that if the trial court has given cogent and detailed reasons for not accepting the testimony of a witness, the appellate court in all fairness to it ought to deal with those reasons before proceeding to form a contrary opinion about accepting the testimony which has been rejected by the trial court."

Three requisites should normally be present before an appellate court reverses a finding of fact recorded by the trial court:<sup>279</sup>

275. *Mohd. Husain Khan v. Babu Kishva Nandan Sahai*, (1936-37) 64 IA 250; AIR 1937 PC 233; *Kiran Singh v. Chaman Paswan*, AIR 1954 SC 340 at p. 342; (1955) 1 SCR 117; *Virendra Singh v. Vimal Kumar*, (1977) 1 SCC 718 at p. 722; AIR 1976 SC 2169 at p. 2172; *Kempamma v. Kamma*, AIR 1992 Kant 282, *Kalipada Das v. Bimal Krishna*, (1983) 1 SCC 14; AIR 1983 SC 876.

276. *Kiran Singh v. Chaman Paswan*, AIR 1954 SC 340; *Virendra Singh v. Vimal Kumar*, (1977) 1 SCC 718.

277. S. 107(2), see also *R S. Lala Praduman v. Virendra Goyal*, (1969) 1 SCC 714. AIR 1969 SC 1349, *Madhusudan Das v. Narayanibai*, (1983) 1 SCC 35. AIR 1983 SC 114; *Jagdish Singh v. Madhuri Devi*, (2008) 10 SCC 497; *Arundhati v. Iranna*, (2008) 3 SCC 181.

278. (1972) 2 SCC 329; AIR 1972 SC 1716 at p. 1719.

279. *Madhusudan Das v. Narayanibai*, (1983) 1 SCC 35 at pp. 39-40; AIR 1983 SC 114; see also *Jagdish Singh v. Madhuri Devi*, (2008) 10 SCC 497.

- (i) it applied its mind to reasons given by the trial court;
- (ii) it had no advantage of seeing and hearing the witnesses; and
- (iii) it records cogent and convincing reasons for disagreement with the trial court.

In *Sarju Pershad v. Jwaleshwari Pratap*<sup>280</sup>, dealing with such a situation, the Supreme Court observed, "The question for our consideration is undoubtedly one of fact, the decision of which depends upon the appreciation of the oral evidence adduced in the case. In such cases, the appellate court has got to bear in mind that it has not the advantage which the trial judge had in having the witnesses before him and of observing the manner in which they deposed in court. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial judge. The rule is—and it is nothing more than a rule of practice—that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate court should not interfere with the finding of the trial judge on a question of fact."<sup>281</sup> *The duty of the appellate court in such cases is to see whether the evidence taken as a whole can reasonably justify the conclusion which the trial court arrived at or whether there is an element of improbability arising from proved circumstances which, in the opinion of the court, outweighs such finding.*<sup>282</sup> (emphasis supplied)

In the case of *Madhusudan Das v. Narayanibai*<sup>283</sup>, the Supreme Court once again observed, "At this stage, it would be right to refer to the general principle that, in an appeal against a trial court decree, when the appellate court considers an issue turning on oral evidence it must bear in mind that it does not enjoy the advantage which the trial court had in having the witnesses before it and of observing the manner in which they gave their testimony. When there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the appellate court should permit the findings of fact rendered by the trial court to prevail unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the trial court or there is a sufficient balance of improbability to displace its opinion as to where the credibility lies . . . . The principle is one of practice and governs the weight to be given to a finding of fact by the trial court. There is, of course,

280. AIR 1951 SC 120, 1950 SCR 781.

281. *Ibid.* at p. 121 (AIR).

282. *Ibid.* at p. 123 (AIR).

283. (1983) 1 SCC 35, AIR 1983 SC 114.

no doubt that as a matter of law if the appraisal of the evidence by the trial court suffers from a material irregularity or is based on inadmissible evidence or on a misreading of the evidence or on conjectures and surmises, the appellate court is entitled to interfere with the finding of fact."<sup>284</sup>

In *Radha Prasad v. Gajadhar Singh*<sup>285</sup>, after considering a number of English as well as Indian decisions, the Supreme Court laid down the following principle, which, it is respectfully submitted, lays down the correct law on the point regarding the powers of the first appellate court in appreciation of evidence and inference with finding of fact recorded by the trial court:

"The position in law, in our opinion, is that when an appeal lies on facts, it is the right and the duty of the appeal court to consider what its decision on the question of facts should be, but in coming to its own decision it should bear in mind that it is looking at the printed record and has not the opportunity of seeing the witnesses and that it should not lightly reject the trial judge's conclusion that the evidence of a particular witness should be believed or should not be believed, particularly when such conclusion is based on the observation of the demeanour of the witness in court. But, this does not mean that merely because an appeal court has not heard or seen the witness it will in no case reverse the findings of a trial Judge even on the question of credibility, if such question depends on a fair consideration of matters on record. When it appears to the appeal court that important considerations bearing on the question of credibility have not been taken into account or properly weighed by the trial judge and such considerations including the question of probability of the story given by the witnesses clearly indicate that the view taken by the trial Judge is wrong, the appeal court should have no hesitation in reversing the findings of the trial judge on such questions. Where the question is not of credibility based entirely on the demeanour of witnesses observed in court but a question of inference of one fact from proved primary facts the court of appeal is in as good a position as the trial judge and is free to reverse the findings if it thinks that the inference made by the trial judge is not justified."<sup>286</sup>

#### (d) Duty to record reasons

Again, though an appellate court has power to dismiss an appeal summarily, such power should be exercised sparingly and in exceptional cases and, that too, after recording reasons. If such appellate court is

284. *Ibid*, at pp. 39-40 (SCC); at pp. 116-17 (AIR).

285. AIR 1960 SC 115; (1960) 1 SCR 663.

286. *Radha Prasad v. Gajadhar Singh*, AIR 1960 SC 115 at p. 118; (1960) 1 SCR 663, see also *Mohd. Salamatullah v. Govt. of A.P.*, (1977) 3 SCC 590. AIR 1977 SC 1481, S V R. *Mudaliar v. Rajabu F. Buhari*, (1995) 4 SCC 15; AIR 1995 SC 1607; *Gajanan Krishnaji v. Dattaji Raghobaji*, (1995) 5 SCC 347; AIR 1995 SC 2284.

other than a High Court, requirement of recording of reasons is mandatory. But in case of a High Court also, it is appropriate if it passes a speaking order when dismissing an appeal *in limine*.

Rule 31, however, enjoins an appellate court to record reasons in support of its judgment. The judgment must be self-contained with reasons in support of the findings arrived at by the court. It must discuss the evidence in the light of points for determination and come to its own conclusion.

In *State of Punjab v. Jagdev Singh*<sup>287</sup>, the High Court allowed the petition of the detenu and set aside an order of detention passed against him. The reasons in support of the judgment were, however, not recorded. When the matter was taken further the Supreme Court observed that when the appellate court is other than the Supreme Court, it is desirable that a final order which an appellate court intends to pass should not be announced until a reasoned judgment is ready for pronouncement. The Supreme Court did not approve the practice of announcing a final order without a reasoned judgment and recorded reasons for not approving such practice in the following words:

"We would like to take this opportunity to point out that serious difficulties arise on account of the practice increasingly adopted by the High Courts, of pronouncing the final order without a reasoned judgment. It is desirable that the final order which the High Court intends to pass should not be announced until a reasoned judgment is ready for pronouncement. Suppose for example, that a final order without a reasoned judgment is announced by the High Court that a house shall be demolished, or that the custody of a child shall be handed over to one parent as against the other, or that a person accused of a serious charge is acquitted, or that a statute is unconstitutional or, as in the instant case, that a detenu be released from detention. *If the object of passing such orders is to ensure speedy compliance with them, that object is more often defeated by the aggrieved party filing a special leave petition in this court in a predicament because, without the benefit of the reasoning of the High Court, it is difficult for this court to allow the bare order to be implemented.* The result inevitably is that the operation of the order passed by the High Court has to be stayed pending delivery of the reasoned judgment."<sup>288</sup> (emphasis supplied)

It is, no doubt, true that normally even the Supreme Court also should follow this practice. However, in exceptional cases, the Supreme Court may depart from this course and pronounce an operative part of the order without a reasoned judgment. But, it cannot be forgotten that the Supreme Court is the *final* court and no further appeal lies against the said order. The reasons, in these circumstances, may not be said to be essential. The Supreme Court rightly observed in this context:

287 (1984) 1 SCC 596 AIR 1984 SC 444.

288 *Ibid*, at p. 611 (SCC) at p. 452 (AIR) (para 30) (*per* Chandrachud, C J).

"It may be thought that as such orders are passed by this court, therefore, there is no reason why the High Courts should not do the same. We would like to point out respectfully that the orders passed by this court are final and no appeal lies against them. The Supreme Court is the final court in the hierarchy of our courts. Besides, orders without a reasoned judgment are passed by this court very rarely, under exceptional circumstances. Orders passed by the High Court are subject to the appellate jurisdiction of this court under Article 136 of the Constitution and other provisions of the statutes concerned. We thought it necessary to make these observations in order that a practice which is not very desirable and which achieves no useful purpose may not grow out of its present infancy."<sup>289</sup> (emphasis supplied)

In *State of Punjab v. Surinder Kumar*<sup>290</sup> also, the Supreme Court reiterated the principle laid down in *Jagdev Singh Talwandi* and made the following observations which, it is submitted, lay down correct law on the point: "On the question of the requirement to assign reasons for an order, a distinction has to be kept in mind between a court whose judgment is not subject to further appeal and other courts. One of the main reasons for disclosing and discussing the grounds in support of a judgment is to enable a higher court to examine the same in case of a challenge. It is, of course, desirable to assign reasons for every order or judgment, but the requirement is not imperative in the case of this court."<sup>291</sup>

(emphasis supplied)

Recently, in *Jagdish Singh v. Madhuri Devi*,<sup>292</sup> the Family Court granted divorce to the husband on the ground of cruelty. The High Court, without considering the relevant evidence and without recording reasons, reversed the finding recorded by the trial court as to cruelty by wife and dismissed the petition filed by the husband by a "cryptic" order. The aggrieved husband approached the Supreme Court.

Allowing the appeal, setting aside the judgment of the High Court and remanding the matter for fresh disposal on merits, the Supreme Court held that the High Court had "virtually" reached a conclusion without recording reasons in support of such conclusion.

The Court stated:

"When the court of original jurisdiction has considered oral evidence and recorded findings after seeing the demeanour of witnesses and having applied its mind, the appellate court is enjoined to keep that fact in mind. It has to deal with the reasons recorded and conclusions arrived at by the trial court. Thereafter, it is certainly open to the appellate court to come to its own conclusion if it finds that the reasons which weighed with the trial court or conclusions arrived at were not in consonance with law."<sup>293</sup>

289. *State of Punjab v. Jagdev Singh*, (1984) 1 SCC 596: AIR 1984 SC 444 para 31

290. (1992) 1 SCC 489. AIR 1992 SC 1593. (1992) 19 ATC 345.

291. *Ibid*, at pp. 491-92 (SCC). at p. 1594 (AIR)

292. (2008) 10 SCC 497. AIR 2008 SC 2296.

293. *Ibid*, at p. 506 (per C.K. Thakker, J.)

### (e) Other duties

An appellate court should not dismiss an appeal *in limine* raising triable issues.<sup>294</sup> An appeal can be admitted or dismissed as a whole. It cannot be admitted partly.<sup>295</sup> Once the appeal is admitted, it cannot be dismissed on technical grounds.<sup>296</sup> An appellate court cannot grant stay against the execution of a decree if an appeal is time-barred.<sup>297</sup> Normally, it should not grant stay against a money decree.<sup>298</sup> When other matters involving a common question or identical points are pending, a summary dismissal of an appeal is not justified.<sup>299</sup> Similarly, when two cognate appeals are filed against the same judgment, both the appeals should be taken up for hearing and decided together.<sup>300</sup> Where an appeal on a similar question or point of law is pending in a superior court, a subordinate court should not proceed to decide the point, but should wait till the question is decided by the higher court.<sup>301</sup>

In first appeal, all questions (questions of fact as also of law) are open. The judgment of the first appellate court must, therefore, be supported on findings on all issues raised in the appeal. If the appellate court agrees with the conclusions of the trial court, it need not restate evidence discussed by the first court and "general agreement" with such findings would be sufficient. But such agreement should not be a device or camouflage for shirking the duty cast on the appellate court.<sup>302</sup>

Where an appeal is heard by a Bench of two or more judges, it must be decided in accordance with their opinion or of the majority of such judges. Where there is no majority concurring in a judgment varying or reversing the decree, the decree shall be confirmed.<sup>303</sup> Where two or other even number of judges composing the Bench differ on a point

294. *Mahadev Tukaram v. Sugandha*, (1973) 3 SCC 746. AIR 1972 SC 1932; *Umakant Vishnu v. Pramulabai*, (1973) 1 SCC 152, *Vinod Trading Co. v. Union of India*, (1982) 2 SCC 40, *Kiranmal v. Dnyanoba Bajirao*, (1983) 4 SCC 223.

295. *Ramji Bhagala v. Krishnarao*, (1982) 1 SCC 433. AIR 1982 SC 1223

296. *Dipo v. Wassan Singh*, (1983) 3 SCC 376; AIR 1983 SC 846, *Jhanda Singh v. Gram Sabha of Village Umri*, (1971) 3 SCC 980.

297. For detailed discussion, see *supra*, "Stay of proceedings and of execution"

298. R. 1(3); see also *Mehra Teja Singh and Co. v. Grindlays Bank Ltd.*, (1982) 3 SCC 199, *Union Bank of India v. Jagan Nath Radhey Shyam and Co.*, AIR 1979 Del 36, *Dijabar v. Sulabha*, AIR 1986 Ori 38, *Malwa Strips (P) Ltd. v. Jyoti Ltd.*, (2009) 2 SCC 426

299. *Vinod Trading Co. v. Union of India*, (1982) 2 SCC 40, *State of Gujarat v. Prabhat Solvent Extraction Industries (P) Ltd.*, (1982) 1 SCC 624, *Bir Bajrang Kumar v. State of Bihar* AIR 1987 SC 1345.

300. *CST v. Viji International Udyog*, (1984) 4 SCC 543. AIR 1985 SC 100

301. *D. K. Trivedi & Sons v. State of Gujarat*, 1986 Supp SCC 20. AIR 1986 SC 1323

302. *Santosh Hazari v. Purushottam Tiwari*, (2001) 3 SCC 179, *Madhukar v. Sangram*, (2001) 4 SCC 756, *Sk. Mehboob Mader v. Sued Ashfaq Hussain*, 1988 Supp SCC 558, *Ratneshwari Nandan v. Bhagwati Saran* AIR 1950 FC 142, 1949 FCR 667, *Govind Prasad v. Hari Dutt* (1977) 4 SCC 736. AIR 1977 SC 1005

303. S. 98. see also *Tej Kumar v. Kirpal Singh* (1995), 5 SCC 119. AIR 1995 SC 1681

of law, they must state the point and the appeal shall then be heard by one or more of other judges and decided according to the opinion of the majority.<sup>304</sup> The object of enacting this provision is that on a question of fact when there is a difference of opinion, the view expressed by the trial court in the absence of a majority opinion should be confirmed.<sup>305</sup>

Where the sanctioned strength of judges is there but only two judges are available who differ from each other and refer the matter to the third judge, the appeal should wait till the arrival of the third judge. It cannot be contended that in such an eventuality the order impugned in the appeal should be confirmed.<sup>306</sup>

An appellate court has to accept a statement of fact as to what transpired at hearing or recorded in the judgment of the court below as true, final and conclusive. If a litigant feels aggrieved by such fact or statement, proper course for him is not to make a complaint before the appellate court but to approach the same court, to call the attention of the same judge who recorded it and to have it deleted or corrected.<sup>307</sup>

## 42. JUDGMENT: SECTION 98, RULES 30-34

After hearing the parties or their pleaders, the appellate court shall pronounce the judgment in open court, either at once or on some future date after giving notice to the parties or their pleaders. It is not necessary for the court to read out the whole judgment and it can read out only the final order but a copy of the whole judgment should be made available for the perusal of the parties or their pleaders after the judgment is pronounced.<sup>308</sup>

The judgment of the appellate court shall be in writing and shall state (i) the points for determination; (ii) the decision thereon; (iii) the reasons for the decision; and (iv) where the appeal is allowed and the decree of the lower court is reversed or varied, the relief to which the appellant is entitled. It shall be signed and dated by the judge or judges concurring therein.<sup>309</sup>

Any judge dissenting from the judgment of the court shall state in writing the decision or order which he thinks should be passed on the appeal and state his reasons for the same.<sup>310</sup>

304. *Ibid.*

305. *Ibid.*

306. *Sikkim Subba Associates v. State of Sikkim*, (2001) 5 SCC 629; AIR 2001 SC 2062.

307. *State of Maharashtra v. Ramdas Shrinivas Nayak*, (1982) 2 SCC 463; AIR 1982 SC 1249. For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers's Edn.) Vol II at p 476; V.G. Ramachandran, *Law of Writs* (2006) Vol. II, Pt. V, Chap. 2.

308 R. 30.

309. Rr. 31, 32; see also *Gunnamani Anasuya v. Parvatini Amarendra*, (2007) 10 SCC 296; AIR 2007 SC 2380; *Shiv Kumar v. Santosh Kumari*, (2007) 8 SCC 600.

310. R. 34.

As stated above, the appellate court is required to record reasons for its decision, but where the appellate court agrees with the view of the trial court on the evidence, it need not restate the effect of evidence and restate the reasons given by the trial court. Expression of general agreement with the reasons given by the trial court would ordinarily suffice.<sup>311</sup>

#### 43. DECREE: RULES 35-37

The decree of an appellate court shall contain (i) the date and the day on which the judgment was pronounced; (ii) number of the appeal, names and description of the parties and a clear specification of the relief granted or other adjudication made; (iii) the costs of the appeal and of the suit and by whom they are to be paid; and (iv) the date and signature of the judge or judges who passed it. A dissenting judge need not sign the decree.<sup>312</sup>

Certified copies of the judgment and decree shall be sent to the lower court and shall be furnished to the parties at their expense on an application being made to the appellate court.<sup>313</sup>

#### 44. LETTERS PATENT APPEAL

The Code of Civil Procedure makes no provision for an appeal within the High Court. Therefore, the question whether an appeal would lie against an order passed by a Single Judge to a Division Bench of the same court would depend upon the provisions of the Letters Patent of the High Court concerned. Under the relevant clause of the Letters Patent of the Chartered High Courts, from a "judgment" of a Single judge of the High Court, an appeal lies to the Division Bench of that High Court provided that such an appeal is not barred by any statute (e.g. Section 100-A of the Code) and provided that the other conditions are satisfied. Such an appeal can be filed within 30 days from the date of the order passed by the Single Judge.<sup>314</sup> The procedure laid down in Order 41 applies to Letters Patent Appeals also.<sup>315</sup>

311 *Girijanandini Devi v. Byendra Narain*, AIR 1967 SC 1124 at p. 1129 (1967) 1 SCR 93. *State of Karnataka v. Hemareddy*, (1981) 2 SCC 185 at pp. 188-89. AIR 1981 SC 1417 at p. 1420. For duty to record reasons by Quasi-judicial Authorities, see, Authors' *Lectures on Administrative Law* (2012) Lecture VI.

312 R. 35. 313 R. 37-36.

314 Art. 117 Limitation Act 1908.

315 *Budge Budge Municipality v. Monerul Hossain*, AIR 1951 Cal 433. *Shah Babulal v. Javaben D. Kania*, (1981) 4 SCC 8. AIR 1981 SC 1786. *Uman Keshao v. Radhakabai*, 1986 Supp SCC 401. AIR 1986 SC 1272. *Devaraju Pillai v. Selappa Pillai*, (1987) 1 SCC 61. AIR 1987 SC 1160.

It may, however, be stated that Section 100-A, as amended by the Code of Civil Procedure (Amendment) Act, 2002 states that notwithstanding anything contained in any Letters Patent for any High Court or in any instrument having the force of law or in any other law for the time being in force, no further appeal<sup>316</sup> shall lie from a judgment and decree by a Single Judge in a first appeal.

In this connection, it may be noted that Justice Malimath Committee had examined the issue of further appeal against a judgment of a Single judge exercising first appellate jurisdiction, i.e. under Section 96 of the Code and also exercising jurisdiction under Article 226 or 227 of the Constitution and recommended to suitably amend Section 100-A of the Code abolishing intra-court appeal in those cases.<sup>317</sup>

The recommendations were accepted and by the Code of Civil Procedure (Amendment) Act, 1999<sup>318</sup>, Section 100-A was amended abolishing Letters Patent Appeal against the decision of a Single Judge in a first appeal as also in a petition under Article 226/227 of the Constitution of India. The Amendment Act of 1999 received assent of the President on 30 December 1999 but was not brought into force. Meanwhile by the Amendment Act of 2002,<sup>319</sup> Section 100-A was further amended and a Letters Patent Appeal was barred against a decision by a Single judge in a First Appeal only. The amendment has been brought into force from 1 July 2002.<sup>320</sup>

#### 45. APPEAL TO SUPREME COURT

Sections 109 and 112 provide for appeals to the Supreme Court in certain circumstances. Order 45 prescribes procedure for such appeals.<sup>321</sup> These provisions, however, have to be read along with the relevant provisions of the Constitution of India.<sup>322</sup>

316. Letters Patent Appeal.

317. Notes on Clauses—Clause 10.

318. Act 46 of 1999.

319. Act 22 of 2002.

320. For detailed discussion, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. II, S. 96.

321. For detailed discussion, see *infra*, Chap 5

322. Arts. 132-36.

## CHAPTER 3

# Second Appeals

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### 1. GENERAL

Sections 100 to 103, 107-108 and Order 42 deal with second appeals. As already stated,<sup>1</sup> a right of appeal is not a natural or inherent right attaching to litigation and it does not exist unless expressly conferred by a statute. Section 100 of the Code allows filing of second appeals in the High Court, if the High Court is satisfied that "the case involves a substantial question of law" but not on any other ground.<sup>2</sup>

### 2. SECTION 100

Section 100 of the Code provides filing of second appeal in the High Court. It reads as under:

1 See *supra*, "First appeals" Chap. 2.

2 S 101

"100. **Second appeal.**—(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

- (2) An appeal may lie under this section from an appellate decree passed *ex parte*.
- (3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.
- (4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.
- (5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."<sup>3</sup>

### 3. NATURE AND SCOPE

Section 100 of the Code as amended by the Amendment Act of 1976 declares that an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to the High Court if the High Court is satisfied that the case involves a substantial question of law. Such appeal lies also against an appellate decree passed *ex parte*. The appellant has to precisely state in the memorandum of appeal the substantial question of law involved in the appeal. Where the High Court is satisfied that a substantial question of law is involved in the case, it shall formulate such question. The High Court can hear the appeal on the question so formulated. It, however, permits the respondent (opposite party) to argue at the hearing of the appeal that the question formulated by the court as a substantial question of law does not involve such question. But the High Court has power to hear the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the

- 3 Sub-section (1) of S. 100 before the Amendment Act of 1976 read as under.  
"Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to a High Court, on any of the following grounds, namely:
  - (a) the decision being contrary to law or to some usage having the force of law,
  - (b) the decision having failed to determine some material issue of law or usage having the force of law;
  - (c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits."

case involves such question. The High Court, however, is required to record reasons for such satisfaction.

The amendment made in Section 100 has drastically changed and considerably curtailed the scope of a second appeal. Under the old section, a second appeal was maintainable on any of the three grounds set out in clauses (a), (b) or (c) of Section 100, which were liberally interpreted by High Courts, resulting in a plethora of conflicting judgments.

The Law Commission rightly observed, "It appears that the wide language of Section 100 and the somewhat liberal interpretation placed judicially on it have practically resulted in giving a goodbye to the basic principle that on questions of fact decisions of courts of first instance would be final subject to one appeal."

After the amendment in Section 100, the following consequences ensued:

- (i) The High Court must be satisfied that the case involves a substantial question of law;<sup>4</sup>
- (ii) The memorandum of appeal must precisely state such question;<sup>5</sup>
- (iii) The High Court at the time of admitting the appeal should formulate such question;<sup>6</sup>
- (iv) The appeal shall be heard only on that question;<sup>7</sup>
- (v) At the hearing of the appeal, the respondent can argue that the case does not involve such question;<sup>8</sup>
- (vi) The High Court is, however, empowered to hear the second appeal on any other substantial question of law, not formulated by it, if it is satisfied that the appeal involves such question. The High Court, however, has to record reasons for doing so.<sup>9</sup>

#### 4. OBJECT

Before the Amendment Act, 1976, the scope of second appeals was very wide. It has been rightly observed, "In dealing with second appeals, the courts had devised and successfully adopted several concepts, such as, a mixed question of fact and law, a legal inference to be drawn from the facts proved, and even the point that the case has not been properly approached by the courts below. This had created confusion in the minds of the public as to the legitimate scope of the second appeal under Section 100 and had burdened the High Courts with an unnecessary large number of second appeals."<sup>10</sup>

4 S 100(1)

5 S 100(3)

6 S 100(4)

7 S 100(5) Or 42 R 2

8 S 100(5), see also *K K Kannan v Koolvathukkal Karikkan Mandi*, (2010) 2 SCC 239

9 Proviso to S 100(5), Or 42 R 2

10 Statement of Objects and Reasons

The Shah Committee which dealt with the arrears of cases in High Courts observed:

"It is necessary to provide for a stricter and better scrutiny of second appeals and they should be made subject to special leave, instead of giving an absolute right of appeal limiting it to a question of law."

The Law Commission<sup>11</sup> in its Fifty-fourth Report reviewed the position and recommended that the right of second appeal should be confined to cases where (i) a question of law was involved; and (ii) the question of law so involved was substantial.

The phraseology used in the amended section (substantial question of law) indicates legislative intent for the change. There is no doubt that it has been done deliberately and intentionally with the avowed object of ensuring that the second appeal may not become a "third trial on facts" or "one more dice in the gamble".<sup>12</sup>

Considering the above recommendations, Section 100 has been drastically amended. By this amendment, the scope and ambit of the jurisdiction of the High Court to interfere with the decision of the inferior courts is very much narrowed down. The right of appeal is confined to cases where a question of law is involved and such question of law is a substantial one. Now the High Court can interfere with the decisions of inferior courts only when it is satisfied that a point involves a substantial question of law.<sup>13</sup> With this, a large number of cases decided under the old Section 100 have become more or less academic.

## 5. SECOND APPEAL AND FIRST APPEAL<sup>14</sup>

## 6. SECOND APPEAL AND REVISION

Though a second appeal as well as a revision both lie in the High Court, there is a difference between the two. A second appeal lies to the High Court on the ground of a substantial question of law, while a revision lies on a jurisdictional error. Revisional powers of the High Court can be invoked only in those cases wherein no appeal lies. A second appeal can be filed against a decree passed by a first appellate court. While exercising revisional jurisdiction, the High Court cannot interfere with an order passed by a subordinate court, if it is within the jurisdiction of such court, even if it is legally wrong. But the High Court can interfere with the decree passed by the first appellate court if it is contrary

11. Law Commission's Fifty-fourth Report at p. 187.

12. *Koli Jiva Gaga v. Koli Ravji Chuga*, (1996) 3 Guj CD 1; *Gurdev Kaur v. Kaki*, (2007) 1 SCC 546; AIR 2006 SC 1975.

13. *Harcharan Singh v. Shivrani*, (1981) 2 SCC 535 at p. 551; AIR 1981 SC 1284 at p. 1294.

14. See *supra*, Chap. 2; *infra*, Chap. 9

to law. A High Court cannot decide a question of fact in revision, but it can decide an issue of fact in a second appeal certain cases. Finally, the High Court may refuse to interfere in revision if it is satisfied that substantial justice has been done. In second appeal, however, the High Court has no discretionary power and it cannot decline to grant relief on equitable grounds.<sup>15</sup>

## 7. SUBSTANTIAL QUESTION OF LAW

### (a) Meaning

The Legislature has not defined the term "substantial question of law", though the expression has been used in the Constitution<sup>16</sup> as well as in other statutes.<sup>17</sup> The phrase, however, cannot be confined to a strait-jacket and no rule of universal application can be formulated as to when it can be said that a substantial question of law has arisen.

### (b) Nature and scope

A High Court can entertain a second appeal provided that it is satisfied that the case "involves" a substantial question of law.<sup>18</sup> The term "involves" suggests that such a question must arise in the case and it is necessary to decide it.<sup>19</sup> The mere fact that the question is raised by the appellant in the appeal is not enough and the High Court is not justified in entertaining the appeal. The term 'involves' implies a considerable element of necessity.<sup>20</sup>

### (c) Test

Though the expression *substantial question of law* has not been defined in the Code, in *Chunilal V. Mehta and sons v. Century Spg. & Mfg. Co. Ltd.*<sup>21</sup>, the Supreme Court observed:

15 For detailed discussion, see *infra*, "Revision"; see also, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. II, Ss. 100, 115

16. Art. 133, Constitution of India.

17. S. 260-A, Income Tax Act, 1961, S. 30, Workmen's Compensation Act, 1923, S. 55, Monopolies and Restrictive Trade Practices Act, 1969.

18 S. 100(1).

19. *SBI v. S N Goyal*, (2008) 8 SCC 92; AIR 2008 SC 2594, *Rajah Tasadduq Rasul v. Manik Chand*, (1902-03) 30 IA 35 (PC), *Karunahaya v. Valangupalli Roman Catholic Mission*, AIR 1943 Mad 67 (1942) 2 MLJ 350, *Kunwar Jagdish Kumar v. L. Harikishan Das*, AIR 1942 Oudh 362, *Ganesh Prasad v. Makhna*, AIR 1948 All 175.

20 *Ibid*, see also *Pankaj Bhargava v. Mohinder Nath*, (1991) 1 SCC 556, AIR 1991 SC 1233, *Santosh Hazari v. Purushottam Tiwari*, (2001) 3 SCC 179, AIR 2001 SC 965, *Gurdev Kaur v. Kaur*, (2007) 1 SCC 546, AIR 2006 SC 1975.

21 AIR 1962 SC 1314, 1962 Supp (3) SCR 549.

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and, if so, whether it is either an open question in the sense that it is not finally settled by this court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well-settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial question of law."<sup>22</sup>

It can thus be said that when a question is fairly arguable, or where there is room for a different opinion, or where an alternative view is equally possible, or where the point is not finally settled, or not free from doubt, it can be said that the question would be a "substantial question of law".<sup>23</sup>

#### (d) Substantial question of law and question of law of general importance

At the same time, however, it should be remembered that, for the purpose of invoking the jurisdiction of the High Court under Section 100 of the Code, the substantial question of law need not be of *general importance*. The Law Commission in its Fifty-fourth Report<sup>24</sup> made it clear by observing:

"It should be noted that *we are not limiting the scope of second appeal to questions of law of general importance*. If the law has been clearly laid down by the High Court, and the decision of the subordinate court is in clear violation of the law as pronounced by the High Court, the power of the High Court to correct it should be left intact. This situation would not be covered if the limitation of general importance is inserted."

(emphasis supplied)

In other words, substantial question of law means a substantial question of law as between the parties in the case involved.<sup>25</sup> A question

22. *Ibid*, at p. 1318 (AIR). at pp. 557-58 (SCR). See also *State of J&K v. Thakur Ganga Singh*, AIR 1960 SC 356 at pp. 359-60: (1960) 2 SCR 346, *State of Kerala v. R. E. D'Souza*, (1971) 1 SCC 533: AIR 1971 SC 832; *Mahindra & Mahindra Ltd. v. Union of India*, (1979) 2 SCC 529 at pp. 550-51. AIR 1979 SC 798 at pp. 811-12; *State of Assam v. Basanta Kumar*, (1973) 1 SCC 461 at p. 469: AIR 1973 SC 1252 at p. 1257, *Pankaj Bhargava v. Mohinder Nath*, (1991) 1 SCC 556. AIR 1991 SC 1233; *Vithaldas v. Ramchandra*, 1995 Supp (3) SCC 374, *Surain Singh v. Mehenga*, (1996) 2 SCC 624.

23. For analytical discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. II, S. 100.

24. Law Commission's Fifty-fourth Report at p. 90.

25. *Raghunath Prasad v. Commr. of Pratapgarh*, (1926-27) 54 IA 126. AIR 1927 PC 110, *Guran Ditta v. Ram T. Ditta*, (1927-28) 55 IA 235. AIR 1928 PC 172, *Bharawan Estate v.*

of law is substantial as between the parties if the decision turns one way or the other on the particular view of law. If it does not affect the decision, it cannot be said to be substantial as between the parties.<sup>26</sup> Ultimately, what is a substantial question of law would depend upon facts and circumstances of each case.<sup>27</sup>

In *Ratanlal Bansilal v. Kishorilal Goenka*<sup>28</sup>, the Full Bench of the High Court of Calcutta after referring to the Fifty-fourth Report of the Law Commission and a number of decisions, observed:

"[B]y importing the expression substantial question of law, the Commission can be said only to have sought to eliminate frivolous, flimsy and fragile second appeals and exhorted the High Courts to be on the strictest vigil against entry of appeals on inconsequential but ingenious grounds. It does not by its own avowal preclude admission of appeal in cases where there has been judicial misconduct in the assessment or admission of evidence. This predicates that facts found upon such misconduct of the proceedings and misapplication of the procedure with regard to evidence will necessarily be a question of law touching the legality of inference on proved facts ...<sup>29</sup> If the law is settled but is not applied to a set of facts despite the finding warranting its application, it is not perceivable how the legislature could conceive of barring the High Court from setting right the erroneous application.<sup>30</sup> Where the finding of fact is on no evidence it is then to be either on assumptions, or on surmises, and conjectures. How such a situation shall be allowed to go unremedied where it leads to the denial of justice? This will bring the judicial system to discredit before the people."<sup>31</sup>

(emphasis supplied)

### (e) Formulation of question

Formulation of a substantial question of law is the *sine qua non* and a condition precedent for the exercise of power by the High Court.<sup>32</sup>

*Rama Krishna*, AIR 1953 SC 521 at p 523; 1954 SCR 506; *Buckingham & Carnatic Co Ltd. v. Workmen*, AIR 1953 SC 47; 1953 SCR 219; *Secy. to Govt Home Deptt v TV Hari Rao*, AIR 1978 Mad 42 at p 45, *Ratanlal v. Kishorilal Goenka*, AIR 1993 Cal 144 (1993) 1 Cal LT 162 (FB).

26. *Mahant Har Kishan v. Satgur Prasad*, AIR 1953 All 129.

27. *Pankaj Bhargava v. Mohinder Nath*, (1991) 1 SCC 556 AIR 1991 SC 1233

28. AIR 1993 Cal 144 (1993) 1 Cal LT 162 (FB).

29. *Ibid.*, at p. 159 (AIR) (para 61)

30. *Ratanlal Bansilal v. Kishorilal Goenka*, AIR 1993 Cal 144 (1993) 1 Cal LT 162 (FB) see also *Kshitish Chandra v. Santosh Kumar*, (1997) 5 SCC 438 AIR 1997 SC 2517; *Kondiba Dagadu v. Savitribai Sopan* (1999) 3 SCC 722 AIR 1999 SC 2213, *Santosh Hazari v. Purushottam Tiwari*, (2001) 3 SCC 179 AIR 2001 SC 965, *Rajeshwari v. Puran Indoria* (2005) 7 SCC 60, *Govindaraju v. Mariamman*, (2005) 2 SCC 500 AIR 2005 SC 1008, *Hero Vinoth (Minor) v. Seshammal*, (2006) 5 SCC 545 AIR 2006 SC 2234, *Gurdev Kaur v. Kati*, (2007) 1 SCC 546 AIR 2006 SC 1975

31. *Ibid.*, at pp 160-61 (AIR) (para 60)

32. S. 100(4). For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol II S. 100.

### (f) Duty of appellant

The Code requires the appellant to precisely state in the memorandum of appeal the substantial question of law involved in the appeal, which he proposes to urge before the High Court.<sup>33</sup>

### (g) Duty of court

If the High Court is satisfied that a substantial question of law is involved in the case, it should formulate such a question.<sup>34</sup>

The Code thus enjoins upon the High Court to formulate a substantial question of law. This duty is irrespective of the duty cast on the appellant. It is, no doubt, open to the High Court to consider the question stated or formulated by the appellant (or by his advocate) in the memorandum of appeal and if the High Court is satisfied that the appeal involves such a question and it is a substantial question of law, it should formulate the question. Often the court admits an appeal by virtually formulating a substantial question (questions) of law by taking it (them) *verbatim* from the memorandum of appeal filed by the appellant. Nevertheless the words "shall formulate that question" leave no room for doubt that ultimately it is the duty of the High Court to formulate a substantial question of law.<sup>35</sup>

### (h) Hearing of appeal

The Code states expressly that the appeal shall be heard on the question (substantial question of law) formulated by the High Court.<sup>36</sup> It thus interdicts the appellant from urging any other ground in appeal without the leave of the court. The scope of hearing of second appeal is thus circumscribed by the question formulated by the court. Not only that but it allows the respondent to argue that the question formulated by the High Court is not involved in the case.<sup>37</sup>

Generally, at the time of preliminary hearing of appeal, the respondent, who had succeeded for the first appellate court is not present in the High Court, and the second appeal is heard *ex parte*. But even if he is

33. S. 100(3); For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. II, S. 100.

34. S. 100(4); For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. II, S. 100.

35. For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. II, S. 100.

36. S. 100(5); For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. II, S. 100.

37. For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) S. 100.

present, admission of appeal is essentially between the appellant and the court and the respondent (or his counsel) has no "right" of audience. Moreover, at that stage, the court does not critically or analytically examine the case *closely*. If *prima facie*, it is satisfied that the appeal *involves* a substantial question of law, it may admit such appeal. It is at the time of final hearing that the respondent may be able to convince the court that no such question of law is involved in the case which can be said or termed "substantial". The legislature, therefore, advisedly conferred a right on the respondent to raise such contention at the time of hearing of appeal.<sup>38</sup>

### (i) Saving power of High Court

Proviso to sub-section (5) of Section 100, however, preserves powers of the High Court taking a second appeal for the final hearing to hear and decide the appeal upon any substantial question of law not framed or formulated at the time of admission of the appeal. The proviso is thus a repository of judicial discretion. It, no doubt, requires the High Court to exercise the power by recording reasons.<sup>39</sup>

### (j) Substantial question of law involved: Illustrative cases

Whether or not, in a particular matter, a substantial question of law is involved depends upon the facts and circumstances of each case. Moreover, the expression "*involves*" implies a considerable degree of necessity. It does not mean that in certain contingencies such a question might possibly arise.<sup>40</sup> Similarly, the mere fact that such a question is raised in the second appeal is also not sufficient. It must definitely and clearly arise in the case.<sup>41</sup> Finally, if a question of law has already been settled by the highest court, that question, however important and difficult it may have been regarded in the past and however large may be its effect on any of the parties, would not be regarded as a substantial question of law.<sup>42</sup>

38 For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol II, S 100

39. Proviso to S 100 (5), see also, Or 42 R 2 For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol II, S 100

40. *Banke Lal v Jagat Narain*, ILR (1901) 23 All 94 at p 98, *Hafiz Mohammad v Sham Lal*, AIR 1944 All 273 at pp 275-76 (FB), *Emperor v Saver Manuel Dantes*, AIR 1941 Bom 245 (FB) *Hansraj Singh v R*, AIR 1949 All 632 at p 634

41 *Ibid*, see also *A B Lagu v State of Madhya Bharat*, AIR 1950 MB 81 at p 82, *Durga Chowdhuri v Jewahar Singh*, ILR (1891) 18 Cal 23 (PC), *Kuar Nirbhair Das v Rani Kuar*, ILR (1894) 16 All 274 at pp 275-76 (PC), *Karuppanan v Srinivasan*, ILR (1902) 25 Mad 215 at pp 219-20 (PC)

42 *Pankaj Bhargava v Mohinder Nath*, (1991) 1 SCC 556 AIR 1991 SC 1233

The following questions may be said to be substantial questions of law:<sup>43</sup>

- (i) A question of law on which there is conflict of judicial opinion;
- (ii) Recording of a finding without any evidence on record;
- (iii) Inference from or legal effect of proved or admitted facts;
- (iv) Disregard or non-consideration of relevant or admissible evidence;
- (v) Taking into consideration irrelevant or inadmissible evidence;
- (vi) Misconstruction of evidence or documents;
- (vii) Interpretation or construction of material documents;
- (viii) A question of admissibility of evidence;
- (ix) Placing onus of proof on a wrong party;
- (x) Disposal of appeal before disposing an application for additional evidence under Order 41 Rule 27, etc.

**(k) Substantial question of law not involved: Illustrative cases**

The following questions were held not to be substantial questions of law:<sup>44</sup>

- (i) Concurrent findings of fact recorded by courts of below;
- (ii) Finding of fact recorded by the first appellate court;
- (iii) Where two views are possible;
- (iv) Where new case is sought to be made out in second appeal;
- (v) Where new plea is raised which is either based on fact, or on mixed question of fact and law, or on mere question of law (and not on substantial question of law);
- (vi) Where the question raised is too general or omnibus in nature;
- (vii) Where inference as to finding of fact has been drawn on the basis of evidence and material on record;
- (viii) Where the question is finally concluded by the Supreme Court, Privy Council or Federal Court;
- (ix) Where a finding of fact has been attacked on the ground that it is erroneous (as against perverse);
- (x) Where the High Court feels that the reasoning of the first appellate court is not proper, etc.

Like first appeal,<sup>45</sup> where second appeal involves construction of material documents and if more than one view is possible, even if the High

43. For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. II, S. 100.

44. *Ibid.*

45. See *supra*, Chap. 2.

Court dismisses the appeal summarily, it should record reasons for doing so.<sup>46</sup>

## 8. NO SECOND APPEAL IN CERTAIN CASES: SECTIONS 101-102

No second appeal is maintainable except on the grounds specified in the Code.<sup>47</sup> Likewise, no second appeal lies in any suit where the subject-matter of the original suit for recovery of money does not exceed twenty five thousand rupees.<sup>48</sup>

## 9. NO LETTERS PATENT APPEAL: SECTION 100-A

Section 100-A as inserted by the Amendment Act of 1976 enacts that no further appeal<sup>49</sup> shall lie against the decision of a Single Judge in a second appeal. In the Statement of Objects and Reasons, it has been stated, "Under the Letters Patent, an appeal lies in certain cases, against the decision of a Single Judge in a second appeal. Such appeal, in effect, amounts to a third appeal. For the purpose of minimising delay in the finality of adjudications, it is not desirable to allow more than two appeals. In the circumstances, new S. 100-A is being inserted to provide that there should be no further appeal against the decision of a Single Judge in a second appeal."<sup>50</sup>

This provision is prospective and not retrospective and would not affect vested right of Letters Patent Appeal against the judgment pronounced before 1 February 1977.<sup>51</sup>

## 10. LIMITATION

A second appeal lies to a High Court within a period of ninety days from the date of the decree appealed against.<sup>52</sup>

## 11. FORM OF APPEAL<sup>53</sup>

Since the second appeal is maintainable only when it involves a substantial question of law, a memorandum of second appeal must precisely

46 *Shanker v. Gangabai* (1976) 4 SCC 112.

47 S. 101.

48 S. 102 as amended by the Amendment Act, 2002.

49 Letters Patent Appeal.

50 Gazette of India, Extra Pt II, S. 2, dt. 08-04-1974 at p. 308.

51 *Fr. Abraham Mathew v. Ilam Pillai*, AIR 1981 Ker 129 (FB).

52 Art. 116 Limitation Act, 1963.

53 For Model Second Appeal see *infra* Appendix E.

state such question. However, unlike the memorandum of first appeal, it need not set out the grounds of objections to the decree appealed from.<sup>54</sup> If the High Court is satisfied that the appeal involves such question, it will formulate that question and the hearing of appeal will be confined to that question only and the appellant cannot urge any other ground in appeal except with the leave of the court. But even if the High Court fails to formulate a substantial question of law at the time of admitting the appeal, the appeal cannot be dismissed on that ground and the court can formulate such a question at a later stage also.<sup>55</sup>

No doubt, such a situation is regrettable. But failure on the part of the court cannot prejudicially or adversely affect the party. This does not, however, mean that the appellant has no duty at all. He must be vigilant to bring to the notice of the court the above error and get it corrected. In a given case if the conduct of the party in this regard lacks *bona fides*, his appeal may be dismissed also, but as a general principle of law, a party cannot be penalised for the mistake of the court. The proviso to sub-section (5) of Section 100 is indicative of the legislative intention in this regard. It confers enabling power upon the court to cure the defect and to ensure that no injustice is done to the appellant.

In *Sonubai Yeshwant v. Bala Govinda*<sup>56</sup>, Masodkar, J. rightly observed, "The restrictive scheme of Section 100 couched in mandatory terms, firstly, casts a duty on the court not to admit the appeals which do not involve substantial questions of law for such an appeal is not provided for; and secondly, it requires the admission order to speak about and spell out such substantial question and, thirdly, on that question the notice has to be issued to the respondents, who are enabled to show that such a question is neither a substantial question of law, nor arises in a given appeal but further at that stage with the leave of the court the appellant is further enabled to rely on any other substantial question of law which can form the part of the debate at the final hearing stage. While working out this compact scheme, however, occasion like the present one may arise wherein though the court admitted the appeal it failed to spell out the substantial questions of law as enjoined by sub-section (4). Doubtless such a situation is regrettable. Nonetheless, such omission is the omission of the court and not of the party. The principle that applies to the omissions, errors or mistakes on the part of the court should always be available in such an eventuality provided the course of justice is not prejudiced or affected to opponent's disadvantage. Once the litigant has diligently followed the procedural law, he cannot be punished for the omission of the court. To act *ex debito justitiae* is the basic rule in matters of administration of justice and, particularly,

54. Or. 41 R. 1. See also *supra*, Chap. 2; *infra*, Appendix D.

55. *Sonubai Yeshwant Jadhav v. Bala Govinda Yadav*, AIR 1983 Bom 156.

56. AIR 1983 Bom 156: (1983) 1 Bom CR 632.

when it arises out of the procedural laws. Failure on the part of the court, therefore, though serious does not affect the process of appeal which is set for final hearing, nor can the appeal be dismissed for that reason. There are ample complementary and supplementary inherent powers with which the court is clothed to cure such defects and that is expressly recognised by the provisions of Section 151 of the Code of Civil Procedure. Drawing upon that power in a given case, the court would be entitled to cure such a defect of court's failure to comply with the mandatory requirements of sub-section (4) of Section 100 even by formulating such a question at the later stage."<sup>57</sup>

## 12. POWER OF HIGH COURT TO DECIDE ISSUE OF FACT: SECTION 103

Though no second appeal lies on a question of fact, when such appeal is already before the High Court, and the evidence on record is sufficient, it may decide any issue of fact necessary for the disposal of the appeal, if such issue (a) has not been determined either by the trial court or by the appellate court or by both; or (b) has been wrongly determined by such court or courts by reason of its/their decisions on a substantial question of law.<sup>58</sup> This provision enables a High Court to decide even an issue of fact in certain circumstances.

## 13. PROCEDURE AT HEARING

The provisions relating to first appeals<sup>59</sup> shall apply to second appeals also.<sup>60</sup>

## 14. PENDING APPEALS

As seen above, the right of appeal is a substantive right and is not merely a matter of procedure. Moreover, institution of a suit carries with it a right of appeal which is a vested right and such right is governed by the

57. *Sonubai Yeshwant v. Bala Govinda*, AIR 1983 Bom 156 at p 162

58. S 103. See also *Kiran Singh v Chaman Paswan*, AIR 1954 SC 340 at p 342 (1955) 1 SCR 117; *Gurbaksh Singh v. Nikka Singh*, AIR 1963 SC 1917 at p 1919 1963 Supp (1) SCR 55; *Afsar Sheikh v. Soleman Bibi*, (1976) 2 SCC 142. AIR 1976 SC 163. *N G Dastane v. S Dastane*, (1975) 2 SCC 326 at p 334. AIR 1975 SC 1534 at p 1539. *Balai Chandra v. Shewdhari Jadav*, (1978) 2 SCC 559 at p 566. AIR 1978 SC 1062 at p 1067. *Jadu Gopal v. Pannalal Bhowmick*, (1978) 3 SCC 215 at p 235. AIR 1978 SC 1329 at pp. 1340-41. *Bhagwan Sharma v. Bani Ghosh*, 1993 Supp (3) SCC 497. AIR 1993 SC 398

59. Or 41, see *supra*, Chap 1.

60. Or 42 R 1, see also 'Nature and Scope' *supra*

law prevailing at the date of filing of the suit or proceeding and it cannot be abrogated or curtailed by a subsequent legislation.<sup>61</sup>

On the above analogy, the right of second appeal which accrued in favour of the appellant on the date of filing of the suit cannot be restricted or narrowed down by the Amendment Act of 1976 by which Section 100 was amended.

However, with a view to remove doubts, Section 97 of the Amendment Act, 1976 relating to "Repeal and Saving" clarifies that the provisions of the new Section 100 will not affect any second appeal admitted before the date the Amendment Act came into force.<sup>62</sup>

## 15. GENERAL PRINCIPLES

From the aforesaid discussion, the following general principles can be deduced regarding second appeals:

- (i) A second appeal lies in the High Court;
- (ii) Such an appeal is maintainable only on a substantial question of law alone;
- (iii) An appeal lies also against an ex parte decree;
- (iv) No second appeal lies except on grounds mentioned in Section 100, i.e. except on a substantial question of law. Thus, no appeal can be filed on a question of fact, question of law, or mixed question of fact and law;
- (v) No second appeal lies in a money decree, where the amount does not exceed twenty five thousand rupees;
- (vi) The memorandum of appeal must state substantial question of law;
- (vii) The High Court should formulate a substantial question of law while admitting an appeal;
- (viii) The appeal will be heard only on such question;
- (ix) The High Court, however, has power to hear the appeal on other substantial question of law not formulated by it at the admission stage by recording reasons;
- (x) At the hearing the respondent can argue that such question does not involve the appeal;
- (xi) A substantial question of law does not mean a question of general importance but a question arising between the parties to the appeal;
- (xii) In certain circumstances, a High Court can also decide an issue of fact;

61. *Colonial Sugar Refining Co. Ltd. v. Irving*, 1905 AC 369 (PC).

62. *Kamla Devi v. Kushal Kanwar*, (2006) 13 SCC 295; AIR 2007 SC 663; *Vidya Vati v. Hans Raj*, AIR 1993 Del 187.

- (xiii) Procedure at the hearing will be the same as that of the first appeal;
- (xiv) No letters patent appeal lies against the decision in the second appeal;
- (xv) The provisions of the Amendment Act of 1976 do not apply to second appeals already admitted prior to the amendment and pending for hearing.

# CHAPTER 4

## Appeals from Orders

### SYNOPSIS

1. General .....549 2. Order: Meaning .....549 3. Order and decree.....549 4. Nature and scope .....550 5. Appealable orders: Section 104, Order 43 .....550 6. Other orders. Section 105, Rule 1-A ..552	7. Res judicata .....552 8. Limitation.....553 9. Forum of appeal: Section 106 .....553 10. Procedure at hearing .....553 11. Letters Patent Appeal .....553 12. Appeal to Supreme Court .....554
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### 1. GENERAL

Sections 104 to 108 and Order 43 deal with appeals from orders. They state that certain orders are appealable. No appeal lies against other orders. But those orders can be attacked in an appeal from the final decree. They also provide for the forum of an appeal.

### 2. ORDER: MEANING

"Order" has been defined as "the formal expression of any decision of a civil court which is not a decree"<sup>1</sup>. Thus, an adjudication of a court which does not fall within "decree", is an "order"<sup>2</sup>.

### 3. ORDER AND DECREE

In spite of some similarities, an order differs from a decree.<sup>3</sup>

1. S. 2(14).

2. *Ibid*, see also *Vidyacharan Shukla v. Khubchand Baghel*, AIR 1964 SC 1099: (1964) 6 SCR 129.

3. For detailed discussion, see *supra*, Pt. I, Chap. 2.

#### 4. NATURE AND SCOPE

The Code has made certain orders appealable. Appeals can be filed only against those orders<sup>4</sup> which are made appealable. No appeal lies from other orders.<sup>5</sup>

#### 5. APPEALABLE ORDERS: SECTION 104, ORDER 43

An appeal shall lie from the following orders:

- (i) An order awarding compensatory costs in respect of false or vexatious claims or defence. (Section 35-A)<sup>6</sup>  
Such appeal, however, is limited to two grounds, namely:
  - (a) No such order could have been made; or
  - (b) An order for less amount ought to have been made.<sup>7</sup>
- (ii) An order refusing leave to institute a suit against public nuisance. (Section 91)<sup>8</sup>
- (iii) An order refusing leave to institute a suit in case of breach of trust. (Section 92)<sup>9</sup>
- (iv) An order awarding compensation for obtaining arrest, attachment or injunction on insufficient grounds. (Section 95)<sup>10</sup>
- (v) An order imposing a fine<sup>11</sup> or directing the arrest or detention in civil prison of any person except where such arrest or detention is in execution of a decree.<sup>12</sup>
- (vi) An order returning a plaint to be presented to the proper court. (Order 7 Rule 10)<sup>13</sup>
- (vii) An order rejecting an application (in appealable cases) to set aside the dismissal of a suit for default. (Order 9 Rule 9)<sup>14</sup>
- (viii) An order rejecting an application (in appealable cases) to set aside an ex parte decree. (Order 9 Rule 13)<sup>15</sup>
- (ix) An order dismissing a suit or striking out defence for non-compliance with an order for discovery. (Order 11 Rule 21)<sup>16</sup>
- (x) An order objecting to the draft of a document or an endorsement on a negotiable instrument. (Order 21 Rule 34)<sup>17</sup>
- (xi) An order setting aside or refusing to set aside a sale. (Order 21 Rule 72, 92)<sup>18</sup>

4. S. 104(1) See also *Keshardeo v. Radha Kissen*, AIR 1953 SC 23 at p. 27 1953 SCR 136 *Ganga Bai v. Vijay Kumar*, (1974) 2 SCC 393; AIR 1974 SC 1126, *Shah Babulal v. Javaben D. Kania*, (1981) 4 SCC 8 AIR 1981 SC 1786.

5. S. 104(2)

6. S. 104(1)(ff)

7. Proviso to S. 104(1)(ff).

8. S. 104(1)(ffa)

9. S. 104(1)(ffa)

10. S. 104(1)(g)

11. S. 104(1)(h), Or. 16 Rr. 10, 12, 17, 21, Or. 26 R. 17.

12. S. 104(1)(h), Or. 38 Rr. 1, 4, Or. 39 R. 2-A.

13. Or. 43 R. 1(a)

14. R. 1(c).

15. R. 1(d)

16. R. 1(f)

17. R. 1(i).

18. R. 1(j)

- (xii) An order rejecting an application to set aside orders passed *ex parte* in execution proceedings. [Order 21 Rule 106(1)]<sup>19</sup>
- (xiii) An order refusing to set aside the abatement or dismissal of a suit. (Order 22 Rule 9)<sup>20</sup>
- (xiv) An order giving or refusing to give leave to continue a suit by or against an assignee. (Order 22 Rule 10)<sup>21</sup>
- (xv) An order rejecting an application (in appealable cases) to set aside the dismissal of a suit for not furnishing security for costs within time. (Order 25 Rule 2)<sup>22</sup>
- (xvi) An order rejecting an application for permission to sue as an indigent person. (Order 33 Rule 5 or 7)<sup>23</sup>
- (xvii) An order in an interpleader suit for costs of the plaintiff where the defendant in interpleader suit sues the plaintiff in another court (Order 35 Rule 3), or for costs and discharge of the plaintiff in an interpleader suit. (Order 35 Rule 4 or 6)<sup>24</sup>
- (xviii) An order to deposit money or other property, or to furnish security, or fresh security for appearance of the defendant (Order 38 Rule 2 or Rule 3) or for attachment of property before judgment. (Order 38 Rule 6)<sup>25</sup>
- (xix) An order granting or refusing to grant interim injunction. (Order 39 Rule 1 or 2)<sup>26</sup>
- (xx) An order for attachment of property or detention of a person disobeying an order of injunction. (Order 39 Rule 2-A)<sup>27</sup>
- (xxi) An order discharging, varying or setting aside injunction. (Order 39 Rule 4)<sup>28</sup>
- (xxii) An order for deposit of money or other thing in court or for its delivery to the person entitled. (Order 39 Rule 10)<sup>29</sup>
- (xxiii) An order for appointment of receiver. (Order 40 Rule 1)<sup>30</sup>
- (xxiv) An order for attachment and sale of property of defaulting receiver. (Order 40 Rule 4)<sup>31</sup>
- (xxv) An order refusing to restore an appeal dismissed for default of appearance by appellant. (Order 41 Rule 19)<sup>32</sup>
- (xxvi) An order refusing to rehear an appeal heard *ex parte*. (Order 41 Rule 21)<sup>33</sup>
- (xxvii) An order of remand (in appealable cases). (Order 41 Rule 23 or 23-A)<sup>34</sup>
- (xxviii) An order granting an application for review. (Order 47 Rule 1)<sup>35</sup>

19. R. 1(ja).

22. R. 1(n).

25. R. 1(q).

28. R. 1(r).

31. R. 1(s).

34. R. 1(u).

20. R. 1(k).

23. R. 1(na).

26. R. 1(r).

29. R. 1(r).

32. R. 1(t).

35. R. 1(w).

21. R. 1(l).

24. R. 1(p).

27. R. 1(r).

30. R. 1(s).

33. R. 1(t).

## 6. OTHER ORDERS: SECTION 105, RULE 1-A

Section 105 enacts that every order whether appealable or not, except an order of remand, can be attacked in an appeal from the final decree on the ground (i) that there is an error, defect or irregularity in the order; and (ii) that such error, defect or irregularity affects the decision of the case.<sup>36</sup> The principle underlying Section 105 is that when an interlocutory order is appealable, the party against whom such order is made is not bound to prefer an appeal against it. There is no such law which compels a party to appeal from every interlocutory order by which he may feel aggrieved. Section 105 makes it clear that an order appealable under Section 104 may be questioned under this section in an appeal from the decree in the suit, even though no appeal has been preferred against the interlocutory order.<sup>37</sup>

Prior to the Amendment Act of 1976, an order under Order 23 Rule 3 recording or refusing to record an agreement, compromise or satisfaction was appealable.<sup>38</sup> By the Amendment Act of 1976, the said provision has been deleted. However Rule 1-A has been added which provides that in an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should, or should not, have been recorded.<sup>39</sup>

## 7. RES JUDICATA

The doctrine of *res judicata* applies to two stages of the same litigation also.<sup>40</sup> Hence, if any interlocutory order has not been challenged, the same would operate as *res judicata* at all subsequent stages of the suit and no party can be allowed to "set the clock back" during the pendency of the proceedings.<sup>41</sup> It thus gives finality to such orders.<sup>42</sup>

36. S. 105 R. 1-A. See also *Satyadhyay Ghosal v. Deorjin Debi*, AIR 1960 SC 941 at p 946. (1960) 3 SCR 590; *Amar Chand v. Union of India*, AIR 1964 SC 1658 at p 1661. *Lonankutty v. Thomman*, (1976) 3 SCC 528 at p 535 AIR 1976 SC 1645 at p 1651 1976 Supp SCR 74; *Jasraj Inder Singh v. Hemraj Multanchand*, (1977) 2 SCC 155 at p. 164 AIR 1977 SC 1011 at pp 1017-18.

37. *Ibid*, see also *Maharajah Moheshur Sing v. Bengal Govt*, (1859) 7 Moo IA 283 at p 302 (PC).

38. Or. 43 R. 1(m) (since repealed)

39. R. 1 A(2) See also *Anant v. Achut* AIR 1981 Bom 357

40. *Satyadhyay Ghosal v. Deorjin Debi*, AIR 1960 SC 941 (1960) 3 SCR 590, *Arjun Singh v. Mohindra Kumar*, AIR 1964 SC 993 (1964) 5 SCR 946, 76, 118, 122, 270, 271, 273, 278, 346, 532, 533. For detailed discussion, see *supra*, Pt II, Chap. 2

41. *Ibid*, see also *Sankaranarayanan v. K. Sreedevi*, (1998) 3 SCC 751, *Ishtear Dass v. Sohan Lal* (2000) 1 SCC 434 AIR 2000 SC 426

42. *Satyadhyay Ghosal v. Deorjin Debi*, AIR 1960 SC 941 (1960) 3 SCR 590, *Arjun Singh v. Mohindra Kumar*, AIR 1964 SC 993 (1964) 5 SCR 946, 76, 118, 122, 270, 271, 273, 278, 346, 532, 533. For detailed discussion see Pt II, Chap. 2

Correctness thereof, however, can be challenged by an aggrieved party in a regular appeal from the final decree.<sup>43</sup>

## 8. LIMITATION

An appeal from an order can be filed in a High Court within ninety days and in another court within thirty days from the date of the order.<sup>44</sup>

## 9. FORUM OF APPEAL: SECTION 106

Appeals from orders in cases in which they are appealable, shall lie to the court to which an appeal would lie from the decree in the suit in which the order is made.<sup>45</sup> Where such order is made by a court other than a High Court in the exercise of appellate jurisdiction, an appeal shall lie to the High Court.<sup>46</sup> In certain circumstances, even a letters patent appeal is maintainable.<sup>47</sup>

## 10. PROCEDURE AT HEARING

The provisions relating to first appeals<sup>48</sup> shall apply to appeals from orders also.<sup>49</sup>

## 11. LETTERS PATENT APPEAL

Sub-section (2) of Section 104 states that no appeal shall lie from any order made in appeal. A question may arise whether a Letters Patent Appeal would lie against an order passed by a Single Judge of the High Court.

There was a conflict of opinions on this point in the past but the controversy has been set at rest by a decision of the Supreme Court in *Shah Babulal v. Jayaben D. Kania*<sup>50</sup> wherein the Apex Court held that Section 104 applies to appeals to the High Court from subordinate courts. If a Single Judge of the High Court exercises original jurisdiction and

43. S 105.

44. Art. 116, Limitation Act, 1963.

45. S. 106.

46. *Ibid.*

47. *Shah Babulal v. Jayaben D. Kania*, (1981) 4 SCC 8 at p. 22. AIR 1981 SC 1786; *Madan Naik v. Hansubala Devi*, (1983) 3 SCC 15: AIR 1983 SC 676; *Jugal Kishore v. S. Satjit Singh*, (1984) 1 SCC 358, *Umaji Keshao v. Radnikabai*, 1986 Supp SCC 401: AIR 1986 SC 1272; *Madhusudan Vegetable Products v. Rupa Chemicals*, (1986) 27 (1) Guj LR 101.

48. Or. 41, see *supra*, Chap. 2.

49. Or 43 R 2.

50. (1981) 4 SCC 8: AIR 1981 SC 1786.

makes an order, an appeal is competent under the Letters Patent to a Division Bench. But if such order is passed by a court subordinate to the High Court and an appeal against that order is decided by the Single Judge of the High Court under Section 104, no Letters Patent Appeal is maintainable.<sup>51</sup>

## 12. APPEAL TO SUPREME COURT

The bar to further appeal under Section 104(2) does not apply to appeals to the Supreme Court.<sup>52</sup>

51. *Ibid*, see also *Resham Singh v Abdul Sattar*, (1996) 1 SCC 49; *New Kenilworth Hotel (P) Ltd v Orissa State Finance Corpn.*, (1997) 3 SCC 462 AIR 1997 SC 978

52. *Dewaji v Ganpatlal*, AIR 1969 SC 560, *Satyadhyam Ghosal v Deorun Debi*, AIR 1960 SC 941 (1960) 3 SCR 590.

## CHAPTER 5

# Appeals by Indigent Persons

### SYNOPSIS

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### 1. GENERAL

As discussed above,<sup>1</sup> Order 33 deals with suits by indigent persons. Order 44 deals with appeals by indigent persons. The provisions of Order 44 are subject in all matters to the provisions of Order 33 insofar as they are applicable.<sup>2</sup>

### 2. WHO MAY APPEAL: RULE 1

Any person entitled to prefer an appeal, who is unable to pay court fee required for the memorandum of appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appeal as an indigent person.<sup>3</sup>

Before the Amendment Act of 1976, certain restrictions were imposed on the right of an indigent person to prefer an appeal under sub-rule (2) of Rule 1. It provided that the court shall reject the application to appeal *in forma pauperis*, unless it is shown that the decree is contrary to law, or to some usage having the force of law, or is otherwise erroneous or unjust. Those restrictions were considered to be unjust, unfair,

1. See *supra*, "Suits by indigent persons", Pt. II, Chap. 16.

2. Or. 44 R. 1. See also *Dipo v. Wassan Singh*, (1983) 3 SCC 376: AIR 1983 SC 846.

3. *Ibid.*

discriminatory and without any rational basis.<sup>4</sup> The Law Commission,<sup>5</sup> therefore, recommended that the said provisions be deleted. The said recommendation of the Law Commission was accepted and, accordingly, sub-rule (2) of Rule 1 was deleted. The present position is that an indigent person may also file an appeal on all the grounds available to an ordinary person. An indigent person can also file cross-objections.<sup>6</sup>

### 3. INQUIRY: RULE 3

Rule 3 provides that where the appellant was allowed to sue as an indigent person in the trial court, no fresh inquiry is necessary if the applicant files an affidavit to the effect that he has not ceased to be an indigent person since the date of the decree appealed from. However, if the government pleader or the respondent disputes the truth of the statement made in such affidavit, an inquiry into the question as to whether or not the applicant is an indigent person shall be held by the appellate court, or under its order by an officer of that court.<sup>7</sup>

Where it is alleged that the applicant became an indigent person after the date of the decree appealed from, the inquiry into the means of the applicant shall be made by the appellate court or under its order by an officer of that court or by the trial court if the appellate court considers it necessary in the circumstances of the case.<sup>8</sup>

### 4. POWER AND DUTY OF COURT

At the stage of hearing of an application, the question to be considered by the court is whether the applicant is an indigent person. If he is, the application will be allowed and the memorandum of appeal will be registered. If he is not, the application will be rejected.<sup>9</sup>

### 5. PAYMENT OF COURT FEES: RULE 2

The rejection of an application for leave to appeal as an indigent person does not *ipso facto* result in the rejection of the memorandum of appeal filed along with the application.<sup>10</sup> It only means that the court is not satisfied about the claim of the applicant that he is an indigent

4 Law Commission's Fifty-fourth Report at p. 313.

5 *Ibid*, see also *Ram Sarup v Union of India*, (1983) 4 SCC 413; AIR 1983 SC 1196

6 Or 41 R 22(5) For detailed discussion of "Cross-objections", see *supra*, Chap 2.

7 R 3(1), see also *M L Sethi v. R P. Kapur*, (1972) 2 SCC 427 AIR 1972 SC 2379

8 R 3(2)

9 *Ram Sarup v Union of India*, (1983) 4 SCC 413 AIR 1983 SC 1196

10 *State of T-C v John Mathew*, AIR 1955 TC 209 (FB), *Shahzadi Begam v Alakh Nath*, AIR 1935 All 620

person and nothing more.<sup>11</sup> Rule 2 empowers the court to grant time for payment of court fees when the application for leave to appeal as an indigent person is rejected.

## 6. LIMITATION

The period of limitation for presenting an application for leave to appeal as an indigent person to the High Court is sixty days and to other courts is thirty days. The limitation starts from the date of the decree appealed from.<sup>12</sup>

## 7. LETTERS PATENT APPEAL

There is difference of opinions as to whether a Letters Patent Appeal lies against an order granting or refusing to grant leave to appeal as an indigent person. The majority opinion, however, is that an appeal is maintainable against such orders. The expression "appeal" as used in Order 44 is very wide and comprehensive and includes a Letters Patent Appeal. The phrase "any person entitled to prefer an appeal" takes within its sweep not only the persons who are entitled to prefer an appeal as of right but also the persons who can file an appeal with the leave of the court.<sup>13</sup>

11. *Ram Sarup v. Union of India*, (1983) 4 SCC 413; AIR 1983 SC 1196.

12. Art. 130, Limitation Act, 1963.

13. *K.Y. Sodamma v. K. Gunneswarudu*, AIR 1973 AP 295; *Chandel Ranjit Kunwar v. Hiralal*, AIR 1972 MP 133.

## CHAPTER 6

# Appeals to Supreme Court

### SYNOPSIS

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### 1. GENERAL

Appeals to the Supreme Court are governed by the provisions of Articles 132, 133 and 134-A of the Constitution of India with regard to civil matters. Subject to the provisions of the Constitution, an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court, if the High Court certifies that—

- (a) The case involves a substantial question of law of general importance; and
- (b) In the opinion of the High Court the said question needs to be decided by the Supreme Court.<sup>1</sup>

Sections 109 and 112 read with Order 45 deal with appeals to the Supreme Court.

### 2. CONDITIONS: SECTION 109, ORDER 45 RULE 3

An appeal would lie to the Supreme Court under Section 109 of the Code only if the following conditions are fulfilled:

1. Ss 109, 112.

- (i) a judgment, decree or final order must have been passed by the High Court;
- (ii) a substantial question of law of general importance must have been involved in the case; and
- (iii) in the opinion of the High Court, the said question needs to be decided by the Supreme Court.

### (i) Judgment, decree or final order

An appeal lies to the Supreme Court only against a judgment, decree or final order of the High Court. A judgment, decree or final order against which an appeal can be preferred to the Supreme Court must be one which purports to put an end to the litigation between the parties.<sup>2</sup> No certificate can be granted in respect of an interlocutory order.<sup>3</sup> *The test whether the order is final or not will not depend on whether the controversy is finally over, but whether the controversy raised before the High Court is finally over or not.*<sup>4</sup> (emphasis supplied)

### (ii) Substantial question of law of general importance

An appeal would lie to the Supreme Court if the High Court certifies that the case involves a substantial question of law of general importance. The expression *substantial question of law of general importance* has not been defined in the Code, but it is clear that the High Court can grant certificate under Section 109 only when it is satisfied that the question of law involved in the case is not only substantial but also of general importance. In other words, the substantial question of law must be such that, apart from the parties to the litigation, the *general public* should be interested in determination of such question by the Supreme Court, e.g., it would affect a large number of persons or a number of proceedings involving the same question.<sup>5</sup> Therefore, if the question is settled by the Supreme Court, the application of the principle to the

2. *Jethanand & Sons v. State of U.P.*, AIR 1961 SC 794 at p. 796: (1961) 3 SCR 754; *Ramesh v. Gendalal*, AIR 1966 SC 1445 at p. 1449: (1966) 3 SCR 198. For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. II at pp. 485-500.

3. *Syedna Taher Saifuddin v. State of Bombay*, AIR 1958 SC 253 at p. 255: 1958 SCR 1010; *Ramesh v. Gendalal Motilal Patni*, AIR 1966 SC 1445.

4. *Ramesh v. Gendalal Motilal Patni*, AIR 1966 SC 1445 at p. 1449: (1966) 3 SCR 198; *Union of India v. Gopal Singh*, (1967) 2 SCWR 639; *Tarapore & Co. v. V.O. Tractors Export*, (1969) 1 SCC 233 at p. 238. AIR 1970 SC 1168 at pp. 1169-70; *Prakash Chand v. Hindustan Steel Ltd.*, (1970) 2 SCC 806 at p. 808: AIR 1971 SC 2319; see also, Or. 45 R 1.

5. *Chunilal V. Mehta and Sons Ltd. v. Century Spg. & Mfg. Co. Ltd.*, AIR 1962 SC 1314 at p. 1318: 1962 Supp (3) SCR 549 at pp. 557-58, *Mahindra & Mahindra Ltd. v. Union of India*, (1979) 2 SCC 529 at pp. 550-51: AIR 1979 SC 798 at pp. 811-12; *SBI v. N. Sundara Money*, (1976) 1 SCC 822 at p. 824: AIR 1976 SC 1111 at p. 1112.

facts of a particular case does not make the question a substantial question of law of general importance.<sup>6</sup>

### (iii) Need to be decided by Supreme Court

It is not sufficient that the case involves a substantial question of law of general importance, but, in addition to it, the High Court must be of the opinion that such question needs to be decided by the Supreme Court. The word *needs* suggests that there has to be a necessity for a decision by the Supreme Court on the question, and such a necessity can be said to exist when, for instance, two views are possible regarding the question and the High Court takes one view of the said views. Such a necessity can also be said to exist when a different view has been expressed by another High Court.<sup>7</sup>

## 3. PROCEDURE AT HEARING

### (a) Application for leave and certificate of fitness

Whoever desires to appeal to the Supreme Court shall apply by a petition to the court whose decree is sought to be appealed from.<sup>8</sup> Ordinarily, such a petition should be decided within sixty days from the date of filing of the petition.<sup>9</sup> Every petition should state the grounds of appeal and pray for the issue of a certificate (i) that the case involves a substantial question of law of general importance; and (ii) that in the opinion of the court the said question needs to be decided by the Supreme Court.<sup>10</sup> After notice to the other side, the court may grant or refuse to grant the certificate.<sup>11</sup>

### (b) Effect of amendment in Constitution

These provisions, however, must be read in the light of and subject to Article 134-A of the Constitution. By the Constitution (Forty-fourth Amendment) Act, 1978, Article 134-A has been inserted with effect from 1 August 1979. It states that every High Court, passing or making a judgment, decree, final order or sentence referred to in Article 132(1) or

6. *Chunilal V. Mehta and Sons Ltd. v. Century Spg. & Mfg. Co. Ltd.*, AIR 1962 SC 1314; *Mahindra & Mahindra Ltd. v. Union of India*, (1979) 2 SCC 529 at pp. 550-51; AIR 1979 SC 798 at pp. 811-12; *SBI v. N. Sundara Money*, (1976) 1 SCC 822 at p. 824; AIR 1976 SC 1111 at p. 1112; *Pankaj Bhargava v. Mohinder Nath*, (1991) 1 SCC 556 at p. 563; AIR 1991 SC 1233. For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. II at pp. 509-14.

7. *SBI v. N. Sundara Money* (1976) 1 SCC 822; *Union of India v. Hafiz Mohd. Said*, AIR 1975 Del 77 at pp. 78-79 (FB). For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. II at pp. 514-15.

8. Or 45 R 2(1)

9. R 2(2)

10. R 3.

11. Rr 3(2) 6-7

133(1) or 134(1), may, if it deems so to do, either *suo motu* or shall, if an oral application is made, by or on behalf of the party aggrieved, *immediately after the passing or making of such judgment, decree, final order or sentence*, determine whether a certificate may be given or not.<sup>12</sup>

The effect of the amendment is that if an aggrieved party wants to approach the Supreme Court under Article 132, 133 or 134 after getting certificate from the High Court, he will have to make an oral application *immediately* after the pronouncement of the judgment, and if such an application is not made immediately, by taking resort to Article 133(b) of the Limitation Act, 1963, he may not be able to approach the Supreme Court. The reason is that the source of power is Articles 132, 133, 134 read with Article 134-A, and if an application is not made as per the provisions of the Constitution, the procedural law [Article 133(b), Limitation Act, 1963] cannot override the substantive law (Article 134-A of the Constitution) and such an application even if it is filed within a period of sixty days from the date of judgment, order, etc. as per Article 133(b) of the Limitation Act, 1963, it is not maintainable at law. The authors are, therefore, of the opinion that in the light of the Constitution (Forty-fourth Amendment) Act, 1978, Article 133(b) of the Limitation Act, 1963 requires to be amended. But even if it is not done, it cannot override the provisions of the Constitution.<sup>13</sup>

### (c) Security and deposit: Rules 7, 9 & 12

When the certificate is granted, the applicant should furnish security for the costs of the respondent and also deposit the expenses for translating, printing, indexing, etc. within the stipulated period. The court may revoke acceptance of security. The court has also the power to refund the balance of the deposit after necessary deductions for expenses.<sup>14</sup>

### (d) Admission of appeal: Rule 8

Where the directions regarding furnishing of security and making of deposit are carried out, the court shall declare the appeal admitted, give notice thereof to the respondent and transmit the record to the Supreme Court.<sup>15</sup> If the security furnished or the costs deposited appears to be

12. For Statement of Objects and Reasons, see, Gazette of India, Pt. II, S. 2, Extra., dt. 15-5-1978 at p. 616; see also *SBI v. Employees' Union*, (1987) 4 SCC 370: AIR 1987 SC 2203.

13. *Keshava S. Jamkhandi v. Ramachandra S. Jamkhandi*, AIR 1981 Kant 97 (1980) 2 Kant LJ 432 (FB); *Dhangir v. Jankidas*, AIR 1990 Raj 102.

14. Rr. 7, 9, 12.

15. R. 8, see also *Shree Jute Baling Ltd. v. Hindley & Co.*, AIR 1955 SC 464 (1955) 2 SCR 243.

inadequate, the court may order further security to be furnished or costs to be deposited.<sup>16</sup> If the appellant fails to comply with such order, the proceedings shall be stayed and the appeal shall not proceed without an order of the Supreme Court.<sup>17</sup> The execution of the decree shall not be stayed meanwhile.<sup>18</sup>

#### (e) Powers of court pending appeal

The pendency of an appeal to the Supreme Court does not affect the right of the decree-holder to execute the decree unless the court otherwise directs.<sup>19</sup> The court may stay execution after taking sufficient security from the appellant or it may allow the decree to be executed after taking sufficient security from the respondent.<sup>20</sup>

#### (f) Execution of orders of Supreme Court: Rules 15-16

The appeal will then be heard by the Supreme Court and an order will be made. Whoever desires to execute a decree or an order of the Supreme Court shall apply by a petition accompanied by a copy of the decree or order sought to be executed to the court from which the appeal was preferred to the Supreme Court. Such court shall transmit the record of the Supreme Court to the trial court or to such court as the Supreme Court may direct, with the necessary directions for execution of the same. The court to which it is transmitted shall execute it in the same manner as it executes its own decrees and orders.<sup>21</sup> The orders relating to such execution shall be appealable in the same manner as the orders relating to the execution of its own decree.<sup>22</sup>

### 4. APPEALS UNDER CONSTITUTION

Over and above Articles 132, 133 and 134-A, Article 136 of the Constitution confers very wide and plenary powers on the Supreme Court to grant special leave to appeal from any judgment, decree, determination, sentence or order (final as well as interlocutory) passed by any court or tribunal. Section 112 of the Code saves the powers conferred on the Supreme Court by the Constitution and declares that nothing in the Code of Civil Procedure would affect these powers.<sup>23</sup>

16. Rr. 10, 14; see also, R 9-A, see also *State of Maharashtra v M N Kaul*, AIR 1967 SC 1634.

17. R. 11.

18. R 13(1) See also *Deochand v. Shiv Ram*, AIR 1965 SC 615 at p 617 (1965) 1 SCR 109

19. Rr 7 9, 12.

20. R 13(2). See also *Deochand v Shiv Ram*, AIR 1965 SC 615

21. R 15

22. R 16

23. For detailed discussion, see, *Authors' Lectures on Administrative Law* (2012) at pp 403-18

# CHAPTER 7

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### 1. NATURE AND SCOPE

Section 113 of the Code empowers a subordinate court to state a case and refer the same for the opinion of the High Court. Such an opinion can be sought when the court itself feels some doubt about a question of law. The High Court may make such order thereon as it thinks fit.

Such opinion can be sought by a court when the court trying a suit, appeal or execution proceedings entertains reasonable doubt about a question of law.<sup>1</sup>

### 2. OBJECT

The underlying object for the provision for reference is to enable subordinate courts to obtain in non-appealable cases the opinion of the High Court in the absence of a question of law and thereby avoid the commission of an error which could not be remedied later on.<sup>2</sup> Such provision also ensures that the validity of a legislative provision (Act, Ordinance or Regulation) should be interpreted and decided by the highest court

1. S. 113; Or. 46 R. 1.

2. *Chhotubhai v. Bai Kashi*, AIR 1941 Bom 365 at p. 366; ILR 1941 Bom 131: (1941) 43 Bom LR 733; *Birendra Kishor v. Secy. of State*, AIR 1921 Cal 262 (FB).

in the State.<sup>3</sup> The reference must, therefore, be made before passing of the judgment in the case.<sup>4</sup>

### 3. CONDITIONS

The right of reference, however, is subject to the conditions prescribed by Order 46 Rule 1 and, unless they are fulfilled, the High Court cannot entertain a reference from a subordinate court.<sup>5</sup> The rule requires the following conditions to be satisfied to enable a subordinate court to make a reference:

- (i) There must be a pending suit or appeal in which the decree is not subject to appeal or a pending proceeding in execution of such decree;
- (ii) A question of law or usage having the force of law must arise in the course of such suit, appeal or proceeding; and
- (iii) The court trying the suit or appeal or executing the decree must entertain a reasonable doubt on such question.

Questions of law on which a subordinate court may entertain a doubt may be divided into two classes:

- (i) Those which relate to the validity of any Act, Ordinance or Regulation; and
- (ii) Other questions.

In the latter case, the reference is optional, but in the former case it is obligatory if the following conditions are fulfilled:<sup>6</sup>

- (i) It is necessary to decide such question in order to dispose of the case;
- (ii) The subordinate court is of the view that the impugned Act, Ordinance or Regulation is *ultra vires*; and
- (iii) There is no determination either by the Supreme Court or by the High Court to which such court is subordinate that such Act, Ordinance or Regulation is *ultra vires*.

3. *Ibid*, see also *Public Prosecutor v. B. Krishnasami*, AIR 1957 AP 567, *M. S. Oberoi v. Union of India*, AIR 1970 Punj 407 (1970) 72 PLR 830; *Indian Council of Agricultural Research v. Veterinary Council of India*, (1996) 63 DLT 786.

4. *Diwalibai v. Sadashivdas*, ILR (1900) 24 Bom 310 at p. 314.

5. *Garling v. Secy. of State for India*, ILR (1903) 30 Cal 458 at p. 462, *Distt. Munsif, Chittoor, In re*, AIR 1970 AP 365, ILR 1970 AP 1175, *Ranadeb Choudhuri v. Land Acquisition Judge*, AIR 1971 Cal 368 at p. 375, 75 CWN 375, *Geerebhalla Dahee v. Chunder Kant*, ILR (1885) 11 Cal 213, *Behramshaw Hormanshah Bharda v. Dastoorji*, AIR 1980 Guj 74.

6. Proviso to S. 113. See also *Ganga Pratap Singh v. Allahabad Bank Ltd.*, AIR 1958 SC 293 at p. 295, 1958 SCR 1150, *State Financial Corpn. Ltd. v. Satpathy Bros. & Nanda Co. (P) Ltd.*, AIR 1975 Ori 132 at p. 133, ILR 1975 Cut 659 (FB), *H. P. Financial Corpn. v. Nahan Electricals*, AIR 1982 HP 49, *Behramshaw Hormanshah v. Dastoorji*, AIR 1980 Guj 74 at p. 78 (1980) 21 Guj LR 202, *Municipal Corpn. of City v. Shrinshanker Gaurishanker*, (1998) 9 SC C 197, AIR 1999 SC 2874.

The object of this provision is to see that the Act of legislature should be interpreted by the Supreme Court in the State.<sup>7</sup>

#### 4. REASONABLE DOUBT

A reference can be made on a question of law only when the judge trying the case entertains a reasonable doubt about it.<sup>8</sup> There can be no reasonable doubt on a question decided by the High Court to which the judge making reference is subordinate.<sup>9</sup> But if such decision is doubted in a later decision by the same court or by a higher court, e.g. Privy Council, Federal Court or Supreme Court, there is a room for reasonable doubt to make reference.<sup>10</sup>

#### 5. WHO MAY APPLY?

Only a court can refer a case either on an application of a party or *suo motu*.<sup>11</sup> "Court" means a Court of Civil Judicature.<sup>12</sup> A tribunal or *persona designata* cannot be said to be a "court" and no reference can be made by them.<sup>13</sup>

#### 6. POWER AND DUTY OF REFERRING COURT

A reference can be made only in a suit, appeal or execution proceeding pending before the court. Such reference can be made when a subordinate court entertains a doubt on a question of law.<sup>14</sup> Further, such question must have actually arisen between the parties litigating and the court must have been called upon to adjudicate the *lis*.<sup>15</sup> No reference,

7. *Public Prosecutor v. B. Krishnasami*, AIR 1957 AP 567

8. *Ralia Ram v. Sadh Ram*, AIR 1952 Pepsu 1 (FB); *E. E. Dawoodjee & Sons v. Municipal Corpn. of Rangoon*, AIR 1923 Rang 193; (1923) 1 Rang 220; 76 IC 519; *Distt. Munsif, Chittoor, In re*, AIR 1970 AP 365.

9. *Ibid*, see also *Bhanaji Raoji Khoji v. Joseph De Brito*, ILR (1906) 30 Bom 226; *Hurish Chunder v. W.P.O. Brien*, (1870) 14 Suth WR 248.

10. *Ibid*, see also *Fatima-ul-Hasna v. Baldeo Sahai*, AIR 1926 All 204(2) (FB); *Puttu Lal v. Parbati Kunwar*, (1914-15) 42 IA 155 (PC); see also *infra*, "Power and duty of referring court".

11. S. 113; Or. 46 R. 1.

12. *Phul Kumari v. State*, AIR 1957 All 495; *Delhi Financial Corpn. v. Ram Pershad*, AIR 1973 Del 28.

13. *Ramakant Bindal v. State of U.P.*, AIR 1973 All 23; *Nanak Chand v. Estate Officer*, AIR 1969 P&H 304; *Banarsi Yadav v. Krishna Chandra*, AIR 1972 Pat 49 (FB).

14. *Tika Ram v. Maheshwari Din*, AIR 1959 All 659; (1959) 2 All 87; 1959 All LJ 592; *State Financial Corpn. Ltd. v. Satpathy Bros. & Nanda Co. (P) Ltd.*, AIR 1975 Ori 132 ILR 1975 Cut 659 (FB); *L.S. Sherlekar v. D.L. Agarwal*, AIR 1968 Bom 439. (1968) 70 Bom LR 100.

15. *Banarsi Yadav v. Krishna Chandra Dass*, AIR 1972 Pat 49 (FB), *Distt. Munsif, Chittoor, In re*, AIR 1970 AP 365; ILR 1970 AP 1175.

hence, can be made on a hypothetical question or to provide an answer to a point likely to arise in future.<sup>16</sup>

But once the question "arises" and the Proviso is attracted and validity of any Act, Ordinance or Regulation is challenged, and the referring court is *prima facie* satisfied that such Act, Ordinance or Regulation is *ultra vires*, the case has to be referred to the High Court.<sup>17</sup>

## 7. POWER AND DUTY OF HIGH COURT

The jurisdiction of the High Court is consultative.<sup>18</sup> In dealing with and deciding the reference the High Court is not confined to the questions referred by a subordinate court. If a new aspect of law arises, the High Court can consider it.<sup>19</sup> The High Court may answer the question referred to it and send back the case to the referring court for disposal in accordance with law.<sup>20</sup> It may also refuse to answer the reference or even to quash it.<sup>21</sup> The High Court, however, cannot make any order on merits nor can it make suggestions.<sup>22</sup>

## 8. PROCEDURE AT HEARING

The referring court should draw up a statement of the facts of the case, formulate the question of law on which opinion is sought and give its opinion thereon.<sup>23</sup> The court may either stay the proceedings or pass a decree or order contingent upon the decision of the High Court on the point referred, which cannot be executed until receipt of a copy of the judgment of the High Court on the reference.<sup>24</sup> If the High Court answers the question in favour of the plaintiff, the decree will be confirmed. If it is answered against him, the suit will be dismissed.<sup>25</sup> The High Court after hearing the parties, if they so desire, shall decide the point so referred and transmit a copy of its judgment to the court which shall dispose of the case in accordance with the said decision.<sup>26</sup> Where the referring court has not complied with the conditions laid

16 *Ibid*, see also *Ranganath v Hanumantha*, (1984) 1 Kant LC 243.

17 *Ganga Pratap Singh v. Allahabad Bank Ltd.*, AIR 1958 SC 293 1958 SCR 1150.

18 *Delhi Financial Corpn v Ram Parshad*, AIR 1977 Del 80, *Raja Hussain v Gaviappa*, AIR 1984 Kant 108.

19 *S K. Roy v Board of Revenue*, AIR 1967 Cal 338; *CIT v. Scindia Steam Navigation Co Ltd*, AIR 1961 SC 1633.

20 Or 46 R. 3, see also *S K Roy v. Board of Revenue*, AIR 1967 Cal 338

21 Or 46 R. 5, see also *Krishnarao Bhaskar v. Lakshman Ramchandra*, AIR 1929 Bom 30

22 *Municipal Corpn of City v Shivshanker Gaurishanker*, (1998) 9 SCC 197 AIR 1999 SC 2874.

23 Or 46 Rr 1, 4-A                      24 R 2

25 *L S. Sherlekar v. D L. Agarwal*, AIR 1968 Bom 439 (1968) 70 Bom LR 100.

26 R 3.

down for making reference, the High Court has power to return the case for amendment.<sup>27</sup> The High Court can even quash the order of reference.<sup>28</sup> The High Court may alter, cancel or set aside any decree or order passed or made by the court making the reference and make such order as it thinks fit.<sup>29</sup>

## 9. COSTS

As a general rule, the costs of reference shall be the costs in the cause.<sup>30</sup> But if the reference is altogether unwarranted, the High Court may direct the referring judge to personally pay the costs.<sup>31</sup>

## 10. REVISION

An order refusing to make reference to the High Court is a "case decided" under Section 115 of the Code and is revisable.<sup>32</sup>

## 11. REFERENCE AND APPEAL<sup>33</sup>

## 12. REFERENCE AND REVIEW<sup>34</sup>

## 13. REFERENCE AND REVISION<sup>35</sup>

## 14. REFERENCE UNDER CPC AND CrPC

Section 395(1) of the Code of Criminal Procedure, 1973 provides that where any Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of the opinion that such Act, Ordinance or Regulation or provision is invalid or inoperative but has not been declared by the High Court to which that court is subordinate or by the Supreme Court, the court shall state a case setting out its opinion and the reason therefor and refer the same for the decision of the High Court.

27. *Garling v. Secy. of State for India*, ILR (1903) 30 Cal 458 at p. 462.

28. *Krishnarao Bhaskar v. Lakshman Ramchandra*, AIR 1929 Bom 30 at p. 31.

29. R. 5. 30. R. 4.

31. *L.S. Sherlekar v. D.L. Agarwal*, AIR 1968 Bom 439 at pp. 442-43.

32. *Cantonment Board v. Phulchand*, AIR 1932 Nag 70.

33. See *infra*, Chap. 9. 34. *Ibid.* 35. *Ibid.*

Sub-section (2) of Section 395 enables a Court of Session or a Metropolitan Magistrate to make reference for the decision of the High Court any question of law arising in a case pending before the court.<sup>36</sup>

## 15. REFERENCE UNDER CPC AND CONSTITUTION

Article 228 of the Constitution provides for transfer of certain cases to a High Court.<sup>37</sup> Section 113 of the Code refers to the questions regarding the validity of any "Act, Ordinance or Regulation or of any provision", while Article 228 of the Constitution refers to a substantial question of law as to the "interpretation of the Constitution". An interpretation of an Act or statute does not necessarily involve an interpretation of the Constitution, nor vice versa. But a question as to the validity of an Act or provision may involve the interpretation of the Constitution in one form or the other.<sup>38</sup>

Again, under Section 113 of the Code, the subordinate court trying the case can go into the question of *vires* of any Act, Ordinance or Regulation and can make a reference only when *prima facie* it is of the opinion that such Act, Ordinance or Regulation is invalid or inoperative; under Article 228 of the Constitution, on the other hand, a subordinate court cannot even investigate into such question. It is the duty of a subordinate court to refer the case to the High Court as soon as it discovers that it involves a substantial question of law as to the interpretation of the Constitution. It is also the duty of the High Court to withdraw such a case from a subordinate court.<sup>39</sup>

36. For detailed discussion, see, Authors' *Criminal Procedure* (2007) at pp. 283-85.

37. Art. 228 reads as under:

"Transfer of certain cases to High Court.—If the High Court is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the case, it shall withdraw the case and may.

(a) either dispose of the case itself; or

(b) determine the said question of law and return the case to the court from which the case has been so withdrawn together with a copy of the judgment on such question, and the said courts shall on receipt thereof, proceed to dispose of the case in conformity with such judgment."

38. *Ranadeb Choudhuri v Land Acquisition Judge*, AIR 1971 Cal 368, *Ganga Pratap Singh v Allahabad Bank Ltd.*, AIR 1958 SC 293, *Penguin Textiles Ltd v A P State Financial Corpn.*, AIR 1971 AP 339.

39. *Ibid.*, see also *Behramshaw Hermanshaw v Dastoorji*, AIR 1980 Guj 74 at p 78 (1980) 21 Guj LR 202 at p 208

## CHAPTER 8

### Review

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#### 1. GENERAL

Section 114 of the Code gives a substantive right of review in certain circumstances and Order 47 provides the procedure therefor. The provision relating to review constitutes an exception to the general rule that once the judgment is signed and pronounced by the court it becomes *functus officio* (ceases to have control over the matter) and has no jurisdiction to alter it.<sup>1</sup>

1. Or. 20 R. 3.

## 2. REVIEW: MEANING

Stated simply, review means to reconsider, to look again or to re-examine.<sup>2</sup> In legal parlance, it is a judicial re-examination of the case by the same court and by the same judge.<sup>3</sup> In review, a judge, who has disposed of the matter reviews an earlier order passed by him in certain circumstances.<sup>4</sup>

## 3. NATURE AND SCOPE

The normal principle of law is that once a judgment is pronounced or order is made, the court becomes *functus officio*. Such judgment or order is final and it cannot be altered or changed.<sup>5</sup>

As a general rule, once an order has been passed by a court, a review of such order must be subject to the rules of the game and cannot be lightly entertained.<sup>6</sup> A review of a judgment is a serious step and reluctant resort to it is called for only where a glaring omission, patent mistake or like grave error has crept in earlier by judicial fallibility.<sup>7</sup>

A power of review should not be confused with appellate powers which enable an appellate court to correct all errors committed by the subordinate court.<sup>8</sup> In other words, it is beyond dispute that a review cannot be equated with the original hearing of the case, and finality of the judgment by a competent court cannot be permitted to be reopened or reconsidered, unless the earlier judicial view is manifestly wrong.<sup>9</sup> It is neither fair to the court which decided the matter nor to the huge backlog of dockets waiting in the queue for disposal to file review

2. Chamber's 21st Century Dictionary (1997) at p. 1197; Random House Dictionary (1970) at p. 1227; Black's Law Dictionary (1979) at p. 1186; Concise Oxford English Dictionary (2002) at p. 1225.

3. *Maharajah Moheshur Sing v. Bengal Govt.*, (1857-60) 7 Moo IA 283; *State of Orissa v. Commr. of Land Records and Settlement*, (1998) 7 SCC 162; AIR 1998 SC 3067. *Lily Thomas v. Union of India*, (2000) 6 SCC 224; AIR 2000 SC 1650.

4. For detailed discussion, see *infra*, "When review lies: Circumstances".

5. Or 20 R. 3.

6. *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845 at p. 855; (1965) 1 SCR 933 at p. 948, *Sow Chandra Kante v. Sk Habib*, (1975) 1 SCC 674; AIR 1975 SC 1500. *Northern India Caterers (India) Ltd. v. Lt Governor of Delhi*, (1980) 2 SCC 167; AIR 1980 SC 674, *Aribam Tuleshwar Sharma v. Aribam Pishak Sharma*, (1979) 4 SCC 389; AIR 1979 SC 1047, *Meera Bhanja v. Nirmala Kumari*, (1995) 1 SCC 170; AIR 1995 SC 455. *State of Orissa v. Commr of Land Records and Settlement*, (1998) 7 SCC 162; AIR 1998 SC 3067. *Kewal Chand v. S K Sen*, (2001) 6 SCC 512.

7. *Ibid*, see also *Moran Mar Basselios Catholicos v. Mar Poulose Athanasius*, AIR 1954 SC 526 at p. 538; (1955) 1 SCR 520.

8. *Ibid*, see also *Lily Thomas v. Union of India*, (2000) 6 SCC 224; AIR 2000 SC 1650. 2000 Cri LJ 2433, *Delhi Admn. v. Gurdip Singh*, (2000) 7 SCC 296, *Susheela Naik v. G K Naik*, (2000) 9 SCC 366.

9. *Ibid*, see also *B H Prabhakar v. Karnataka State Coop Apex Bank Ltd.*, (2000) 9 SCC 482.

petitions indiscriminately and fight over again the same battle which has been fought and lost. Public time is wasted in such matters and the practice, therefore, should be deprecated.<sup>10</sup> Greater care, seriousness and restraint is needed in review applications.<sup>11</sup>

If a review application is not maintainable, it cannot be allowed by describing such an application as an application for "clarification" or "modification".<sup>12</sup>

A right of review is both, substantive as well as procedural. As a substantive right, it has to be conferred by law, either expressly or by necessary implication. There can be no inherent right of review. As a procedural provision, every court or tribunal can correct an inadvertent error which has crept in the order either due to procedural defect or mathematical or clerical error or by misrepresentation or fraud of a party to the proceeding, which can be corrected *ex debito justitiae* (to prevent the abuse of process of court)<sup>13</sup>.

#### 4. OBJECT

The remedy of review, which is a reconsideration of the judgment by the same court and by the same judge, has been borrowed from the courts of equity. The concept was not known to common law. The remedy has a remarkable resemblance to a writ of error.<sup>14</sup> The basic philosophy inherent in the recognition of the doctrine of review is acceptance of human fallibility. If there is an error due to human failing, it cannot be permitted to perpetuate and to defeat justice. Such mistakes or errors must be corrected to prevent miscarriage of justice.<sup>15</sup> Justice is above all. It is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can come in its way. The law has to bend before justice.<sup>16</sup> Rectification of an order stems from the fundamental

10. *Sow Chandra Kante v. Sk. Habib*, (1975) 1 SCC 674; AIR 1975 SC 1500; *Delhi Admn. v. Gurdip Singh*, (2000) 7 SCC 296.
11. *Delhi Admn. v. Gurdip Singh Uban*, (2000) 7 SCC 296 at p. 309; *Sow Chandra Kante v. Sk. Habib*, (1975) 1 SCC 674; AIR 1975 SC 1500.
12. *Delhi Admn. v. Gurdip Singh Uban*, (2000) 7 SCC 296 at p. 309; see also *Sone Lal v. State of U.P.*, (1982) 2 SCC 398.
13. *Delhi Admn. v. Gurdip Singh Uban*, (2000) 7 SCC 296; AIR 2000 SC 3737; *Patel Narshi Thakershi v. Pradyuman Singhji*, (1971) 3 SCC 844; AIR 1970 SC 1273; *M.C. Mehta v. Union of India*, (1999) 2 SCC 91; AIR 1999 SC 582.
14. *Sow Chandra Kante v. Sk. Habib*, (1975) 1 SCC 674; AIR 1975 SC 1500; *Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi*, (1980) 2 SCC 167; AIR 1980 SC 674.
15. *Ibid*, see also *S. Nagaraj v. State of Karnataka*, 1993 Supp (4) SCC 595; *Lily Thomas v. Union of India*, (2000) 6 SCC 224; AIR 2000 SC 1650; *Cauvery Water Disputes Tribunal, Re*, 1993 Supp (1) SCC 96 (2); *Susheela Naik v. G.K. Naik*, (2000) 9 SCC 366.
16. *Lily Thomas v. Union of India*, (2000) 6 SCC 224; AIR 2000 SC 1650; 2000 Cri LJ 2433; *S. Nagaraj v. State of Karnataka*, 1993 Supp (4) SCC 595.

principle that justice is above all. It is exercised to remove an error and not to disturb finality.<sup>17</sup>

## 5. REVIEW AND APPEAL<sup>18</sup>

## 6. REVIEW AND REFERENCE<sup>19</sup>

## 7. REVIEW AND REVISION<sup>20</sup>

## 8. WHO MAY APPLY?

A person aggrieved by a decree or order may apply for review of a judgment.<sup>21</sup> A "person aggrieved" means a person who has suffered a legal grievance or against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something.<sup>22</sup> The expression "person aggrieved" denotes an elastic, and to some extent, an illusive concept. It cannot be confined within the bounds of a rigid, exact and comprehensive definition.<sup>23</sup>

Generally speaking, a person aggrieved has been understood to mean one who has a genuine grievance because an order has been made which prejudicially affects his interests.<sup>24</sup> But the concept of "person aggrieved" varies according to the context, purpose and provisions of the statute.<sup>25</sup> However leniently one may construe the expression "party aggrieved", a person not affected directly and immediately cannot be so considered, otherwise an interpretation of service rules and regulations may affect several members and they will also be considered "persons aggrieved".<sup>26</sup>

17. *Ibid*, see also *Common Cause, A Registered Society v. Union of India*, (1999) 6 SCC 667 at p. 752; AIR 1999 SC 2979.

18. *See infra*, Chap. 9.

19. *Ibid*.

20. *Ibid*.

21. S 114; Or. 47 R 1

22. *Sidebotham, Re, ex p Sidebotham*, (1880) 14 Ch D 458 at p. 465; (1874-80) All ER Rep 588 (CA), *Kabari (P) Ltd. v Shivnath Shroff*, (1996) 1 SCC 690; AIR 1996 SC 742, *S P Gupta v. Union of India*, 1981 Supp SCC 87; AIR 1982 SC 149. For detailed discussion of "Person aggrieved", see, V.G. Ramachandran, *Law of Writs* (1993) at pp 22-43

23. *Jasbhai Motibhai v Roshan Kumar*, (1976) 1 SCC 671 at p. 677; AIR 1976 SC 578 at p. 581; *Bangalore Medical Trust v B S Muddappa*, (1991) 4 SCC 54; AIR 1991 SC 1902

24. *Attorney General of the Gambia v N'jie*, 1961 AC 617 at p 634 (1961) 2 All ER 504 (PC) (per Lord Denning), see also *Official Receiver, ex p. Re, Reed, Bowen & Co.*, (1887) 19 QB 174, *Adi Pheroze Shah Gandhi v H M Seervai*, (1970) 2 SCC 484; AIR 1971 SC 385

25. *Bar Council of Maharashtra v. M V. Dabholkar*, (1975) 2 SCC 702. AIR 1975 SC 2092 at p. 2098

26. *Gopabandhu Biswal v. Krishna Chandra*, (1998) 4 SCC 447.

A person who is neither a party to the proceedings nor a decree or order binds him, cannot apply for review as the decree or order does not adversely or prejudicially affect him.<sup>27</sup> But if third party is affected or prejudiced by a judgment or order, he can seek review of such order.<sup>28</sup> Again, a person who is a necessary party to the suit and yet not joined and the order passed in such suit affects him, may seek review thereof.<sup>29</sup>

## 9. WHEN REVIEW LIES?: CIRCUMSTANCES

A review petition is maintainable in the following cases:

### (a) Cases in which no appeal lies

A decree or order from which no appeal lies is open to review.<sup>30</sup> Hence, an application for review against a decree passed by a Court of Small Causes is competent.<sup>31</sup> On the same principle, where an appeal is dismissed on the ground that it was incompetent or was time-barred, the provisions of review would get attracted.<sup>32</sup>

### (b) Cases in which appeal lies but not preferred

A review petition is also maintainable in cases where appeal is provided but no such appeal is preferred by the aggrieved party.<sup>33</sup> The fact that an order is subject to appeal is no ground to reject an application for review.<sup>34</sup> An application for review can be presented so long as no appeal is preferred against the order.<sup>35</sup>

Where, however, an appeal is already instituted before making an application for review, the court cannot entertain such application.<sup>36</sup> Likewise, where an appeal is preferred and is disposed of, no review

27. *Bharat Singh v. Firm Sheo Pershad Giani Ram*, AIR 1978 Del 122; *Gopabandhu Biswal v. Krishna Chandra*, (1998) 4 SCC 447; *Jagdish Ch. Patnaik v. State of Orissa*, (1998) 4 SCC 456; AIR 1998 SC 1926, *Satvir Singh v. Baldeva*, (1996) 8 SCC 593; AIR 1997 SC 169.

28. *Shivdeo Singh v. State of Punjab*, AIR 1963 SC 1909.

29. *Savithramma v. H. Gurappa Reddy*, AIR 1996 Kant 99 at p. 106; (1996) 1 Civ LJ 557.

30. S. 114(a); Or. 47 R. 1(1)(b); see also *Ganeshi Lal v. Seth Mool Chand*, AIR 1935 All 435; ILR (1935) 57 All 781; 157 IC 1084.

31. S. 114(c); Or. 47 R. 1; see also *Ganeshi Lal v. Seth Mool Chand*, AIR 1935 All 435; ILR (1935) 57 All 781; 157 IC 1084.

32. *Ram Baksh v. Rajeshwari Kunwar*, AIR 1948 All 213; *Thungabhadra Industries Ltd. v. Govt. of A.P.*, AIR 1964 SC 1372; (1964) 5 SCR 174.

33. R. 1(1)(a); see also *Lily Thomas v. Union of India*, (2000) 6 SCC 224; AIR 2000 SC 1650.

34. *Mohd. Bakhsh v. Pirthi Chand*, AIR 1933 Lah 226; ILR (1933) 14 Lah 55; 143 IC 768.

35. *Sitaramasastry v. Sunderamma*, AIR 1966 AP 173.

36. *Gopabandhu Biswal v. Krishna Chandra*, (1998) 4 SCC 447; AIR 1998 SC 1872.

would lie against the decision of the lower court.<sup>37</sup> But if an application for review is preferred first and then an appeal is filed, the jurisdiction of the court to deal with and decide the review petition is not affected.<sup>38</sup>

The words "from which an appeal is allowed" should be construed liberally keeping in mind the underlying object of the provision that before making a review application, no superior court has been moved for getting the selfsame relief, so that for one and the same relief two parallel proceedings before two forums are not taken.<sup>39</sup> If review is granted before disposal of the appeal, the decree or order ceases to exist and the appeal will not remain.<sup>40</sup>

Conversely, if appeal is decided on merits before an application of review is heard, such petition becomes infructuous and is liable to be dismissed.<sup>41</sup> The principle applies to dismissal of Special Leave Petitions by the Supreme Court.<sup>42</sup> But if a Special Leave Petition is merely filed and is not decided, the bar would not apply.<sup>43</sup>

### (c) Decisions on reference from Court of Small Causes

The Code of Civil Procedure, 1908 allows a review of a judgment on a reference from a Court of Small Causes.<sup>44</sup>

## 10. GROUNDS

An application for review of a judgment may be made on any of the following grounds:<sup>45</sup>

- (i) Discovery of new and important matter or evidence; or
- (ii) Mistake or error apparent on the face of the record; or
- (iii) Any other sufficient reason.

Let us consider the above grounds in detail:

37. *Mallikarjun Sadashiv v. Suratram Shivalal*, AIR 1971 Bom 45; *Ganeshi Lal v. Seth Mool Chand*, AIR 1935 All 435. ILR (1935) 57 All 781. 157 IC 1084.

38. *Thungabhadra Industries Ltd. v. Govt. of A.P.*, AIR 1964 SC 1372; (1964) 5 SCR 174.

39. *Kabari (P) Ltd. v. Shrinath Shroff*, (1996) 1 SCC 690 at pp. 703-04. AIR 1996 SC 742

40. *Ram Baksh v. Rajeshwari Kunwar*, AIR 1948 All 213.

41. *Gour Krishna Sarkar v. Nilmadhab Shah*, AIR 1923 Cal 113 (1922) 36 Cal LJ 484 73 IC 34, *Khatemannessa Bibi v. Upendra Chandra*, AIR 1928 Cal 804.

42. *Shree Narayana Dharmasanghom Trust v. Swami Prakasananda*, (1997) 6 SCC 78. *State of Maharashtra v. Prabhakar Bhikaji*, (1996) 3 SCC 463, *Yogendra Narayan v. Union of India*, (1996) 7 SCC 1, *Abhai Maligai Partnership Firm v. K. Santhakumaran*, (1998) 7 SCC 186 AIR 1998 SC 1486

43. *Kapoor Chand v. Ganesh Dutt*, 1993 Supp (4) SCC 432 AIR 1993 SC 1145

44. R. 1(1)(c), see also *Ramchandra v. Sitaram Vinayak*, ILR (1886) 10 Bom 68, *Ganeshi Lal v. Seth Mool Chand*, AIR 1935 All 435. ILR (1935) 57 All 781. 157 IC 1084.

45. Or 47 R 1

### (i) Discovery of new evidence

A review is permissible on the ground of discovery by the applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed.

As a general rule, where a litigant has obtained a judgment in a court of justice, he is by law entitled not to be deprived of the fruits thereof without very strong reasons.<sup>46</sup> Therefore, where a review of a judgment is sought by a party on the ground of discovery of fresh evidence, utmost care ought to be exercised by the court in granting it.<sup>47</sup>

It is very easy for the party who has lost the case to see the weak points in his case and he would be tempted to try to fill in gaps by procuring evidence which will strengthen that weak part of his case and put a different complexion upon that part.<sup>48</sup>

The underlying object of this provision is neither to enable the court to write a second judgment<sup>49</sup> nor to give a second innings to the party who has lost the case because of his negligence or indifference.<sup>50</sup> Therefore, a party seeking review must show that there was no remiss on his part in adducing all possible evidence at the trial.<sup>51</sup>

Again, the new evidence must be such as is presumably to be believed, and if believed to be conclusive.<sup>52</sup> In other words, such evidence must be (1) relevant; and (2) of such a character that if it had been given it might possibly have altered the judgment.<sup>53</sup>

Thus, the discovery of a document containing an admission of liability by the defendant would be a good ground for review.<sup>54</sup> Similarly, where the decree for restitution of conjugal rights was passed and subsequently it was discovered that the parties were cousins and the

46. *Nundo Lal v. Punchanon Mukherjee*, AIR 1918 Cal 618 at p. 621; *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845 at p. 855. (1965) 1 SCR 933 at p. 948; *Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi*, (1980) 2 SCC 167 at pp. 171-72; AIR 1980 SC 674 at pp. 677-78.

47. *Nundo Lal case*, AIR 1918 Cal 618; *Hridey Kanta v. Jogesh Chandra*, AIR 1959 Cal 150 at p. 152; *State of Gujarat v. Dr. B.J. Bhatt*, (1977) 18 Guj LR 173 at p. 175.

48. *Nundo Lal Mullick v. Punchanon Mukherjee*, AIR 1918 Cal 618.

49. *S.O. Krishna Aiyar v. S.V. Narayanan*, AIR 1951 Mad 660; *Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi*, (1980) 2 SCC 167; *Patel Naranbhai v. Patel Gopaladas*, AIR 1972 Guj 229.

50. *Sardar Balbir Singh v. Atma Ram*, AIR 1977 All 445 at p. 447; *Sow Chandra Kante v. Sk Habib*, (1975) 1 SCC 674; AIR 1975 SC 1500.

51. *Kessowji Issur v. Great Indian Peninsula Railway Co.*, (1906-07) 34 IA 115 (PC); ILR (1907) 31 Bom 381 (PC); *Patel Naranbhai Jinabhai v. Patel Gopaladas Venidas*, AIR 1972 Guj 229; *Sardar Balbir Singh v. Atma Ram Srivastava*, AIR 1977 All 445.

52. *Brown v. Dean*, 1910 AC 373 (HL) at p. 374.

53. *Appa Rao, In re*, ILR (1886) 10 Mad 73 (PC); *Nundo Lal v. Punchanon Mukherjee*, (1980) 2 SCC 167.

54. *Faiz Mohhamad v. Mohd. Zakariya*, (1911) 11 IC 15 (Lah).

marriage was, therefore, null and void, the review was granted.<sup>55</sup> Again, where the court issued commission for the examination of a witness in Pakistan and subsequently it was brought to its notice that there was no reciprocal arrangement in this respect between Pakistan and India, the court reviewed its earlier decision.<sup>56</sup>

But where it is doubtful whether the evidence, even if produced, would have had any effect on the judgment, review cannot be granted. Thus, where a suit was dismissed on two grounds; namely (i) for want of notice as required by law; and (ii) the illegitimacy of the plaintiff; and a review was applied for on the ground of legitimacy of the plaintiff, it was refused on the ground that the suit was, in any case, required to be dismissed on the ground of want of notice.<sup>57</sup> Further, Rule 1 refers to *evidence* or other matter in the nature of evidence, and therefore, review cannot be granted on the ground of discovery of new points of law or authorities which show that the decision was not correct.<sup>58</sup> Nor can it be granted on the happening of some subsequent event or change in law.<sup>59</sup>

As observed by Lord Davey,<sup>60</sup> "The section<sup>61</sup> does not authorise the review of a decree which was right when it was made on the ground of happening of some subsequent event."

Before an application of review can be granted, the applicant must establish that even after exercise of due diligence, such evidence was not within his knowledge or could not be produced by him before the court at the time when the decree was passed.<sup>62</sup> There must be sufficient evidence of diligence in getting all the evidence available.<sup>63</sup>

An application for review should be refused when such evidence could have been produced had reasonable care and diligence been exercised.<sup>64</sup> Thus, where the trial lasted for three years, an application for review of the judgment was refused on the ground that no sufficient

55. *Mary Josephine v. James Sidney*, AIR 1930 Pat 63.

56. *Mohd. Azizul v. Mohd. Ibrahim*, AIR 1958 All 19.

57. *Mahabir Prasad v. Collector of Allahabad*, AIR 1914 All 44; *Jina Lima v. Lalji Parbat*, AIR 1951 Kutch 59.

58. *Rajah Kotagiri Venkata Subbamma Rao v. Rajah Vellanki Venkatrama Rao*, (1899-1900) 27 IA 197, *Raja Shatrungi v. Mohd. Azmat*, (1971) 2 SCC 200 at pp. 203-04. AIR 1971 SC 1474 at pp. 1476-77, *Patel Naranbhai v. Patel Gopaldas*, AIR 1972 Guj 229.

59. *A C Estates v. Serajuddin & Co.*, AIR 1966 SC 935 (1966) 1 SCR 235, *Raja Shatrungi v. Mohd. Azmat Azim Khan*, (1971) 2 SCC 200.

60. *Rajah Kotagiri Venkata Subbamma Rai v. Rajah Vellanki Venkatrama Rao*, (1899-1900) 27 IA 197 (PC).

61. Present Or 47 R 1.

62. *Kessowji Issur v. Great Indian Peninsula Railway Co.*, ILR (1907) 31 Bom 381, *Nundo Lal v. Panchanon Mukherjee*, AIR 1916 Cal 618, *Administrator General of W. B. v. Kumar Purnendu*, AIR 1970 Cal 231 at p. 234.

63. *Mahabir Prasad v. Collector of Allahabad*, AIR 1914 All 44. *Jina Lima v. Lalji Parbat*, AIR 1951 Kutch 59.

64. *Ibid*.

cause was shown as to why the new evidence was not produced at the relevant time.<sup>65</sup>

## (ii) Error apparent on the face of record

Another ground for review is a mistake or an error apparent on the face of the record. What is an error apparent on the face of the record cannot be defined precisely or exhaustively, and it should be determined judicially on the facts of each case.<sup>66</sup> Such error may be one of fact or of law.<sup>67</sup> However, no error can be said to be an error apparent on the face of the record if it is not self-evident and requires an examination or argument to establish it.<sup>68</sup> In other words, an error cannot be said to be apparent on the face of the record where one has to travel beyond the record to see if the judgment is correct or not.<sup>69</sup>

An error which has to be established by a long drawn out process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record.<sup>70</sup>

In *Thungabhadra Industries Ltd. v. Govt. of A.P.*<sup>71</sup>, the Supreme Court rightly observed:

"A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but it would suffice for us to say that *where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out*"<sup>72</sup> (emphasis supplied)

65. *Shivalingappa v. Revappa*, AIR 1915 PC 78.

66. *Hari Vishnu Kamath v. Ahmad Ishaque*, AIR 1955 SC 233 at p. 244: (1955) 1 SCR 1104.

67. *Karutha Kritya v. R. Ramalinga Raju*, AIR 1960 AP 17 at p. 21.

68. *Thungabhadra Industries*, AIR 1964 SC 1372; *Satyanarayan v. Mallikarjun Bhavanappa*, AIR 1960 SC 137 at p. 141-42: (1960) 1 SCR 890; *Beant Singh v. Union of India*, (1977) 1 SCC 220 at pp. 221-22: AIR 1977 SC 388 at p. 389. [The expression "record" should be construed liberally and should not be restricted as is done in the writ of *certiorari*; *Moran Mar Basselios Catholicos v. Mar Poulouse Athanasius*, AIR 1954 SC 526 at p. 538: (1955) 1 SCR 520; *P.N. Eswara Iyer v. Registrar, Supreme Court of India*, (1980) 4 SCC 680: AIR 1980 SC 808; *Meera Bhanja v. Nirmala Kumari*, (1995) 1 SCC 170: AIR 1995 SC 455; *Parsion Devi v. Sumitri Devi*, (1997) 8 SCC 715; *Delhi Admn. v. Gurdip Singh*, (2000) 7 SCC 296: AIR 2000 SC 3737.]

69. *Ibid.*, see also *Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumala*, AIR 1960 SC 137: (1960) 1 SCR 890.

70. *Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumala*, AIR 1960 SC 137: (1960) 1 SCR 890, *Meera Bhanja v. Nirmala Kumari*, (1995) 1 SCC 170: AIR 1995 SC 455.

71. AIR 1964 SC 1372: (1964) 5 SCR 174.

72. *Ibid.*, at p. 1377 (AIR); see also, *Authors' Lectures on Administrative Law* (2008) Lecture VII.

The following have been held to be errors apparent on the face of the record: pronouncement of judgment without taking into consideration the fact that the law was amended retrospectively;<sup>73</sup> or without considering the statutory provisions;<sup>74</sup> or on the ground of omission to try a material issue in the case;<sup>75</sup> or on the ground that the court decides against a party on matters not in issue;<sup>76</sup> or where the judgment is pronounced without notice to the parties;<sup>77</sup> or where the want of jurisdiction is apparent on the face of the record;<sup>78</sup> or taking a view contrary to the law laid down by the Supreme Court.<sup>79</sup>

The following have been held not to be errors apparent on the face of the record: an erroneous decision on merits;<sup>80</sup> or an erroneous view of law;<sup>81</sup> or the fact that the other High Court has taken a different view on the question;<sup>82</sup> or that a different conclusion would have been arrived at;<sup>83</sup> or where the judgment is based on two or more grounds, each of which is sufficient to sustain it and one of them is erroneous.<sup>84</sup>

The Explanation to Rule 1 has been inserted by the Amendment Act of 1976. It clarifies the fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for review of such judgment.

### (iii) Other sufficient reason

The last ground for review is "any other sufficient reason". The expression "any other sufficient reason" has not been defined in the Code. However, relying on the judgment of the Privy Council<sup>85</sup> and the

73. *Raja Shatrunji v. Mohd. Azmat*, (1971) 2 SCC 200.

74. *Gulam Abbas v. Mulla Abdul Kadar*, (1970) 3 SCC 643.

75. *Moran Mar Basselios Catholicos v. Mar Poulouse Athanasius*, AIR 1954 SC 526 at p. 540: (1955) 1 SCR 520.

76. *Ibid*, at p. 545 (AIR).

77. *Bankey Bihari v. Abdul Rehman*, AIR 1932 Oudh 63.

78. *Lahiri v. Makhan Lal Basak*, AIR 1935 Cal 153 (1); *Ram Prosad v. Sricharan Mandal*, AIR 1918 Cal 946; *Bommadevara Venkatarayulu v. Lanka Venkata Rattamma*, AIR 1939 Mad 293.

79. *CST v. Pine Chemicals*, (1995) 1 SCC 58, *Medical & Dental College v. M.P. Nagaraj*, AIR 1972 Mys 44.

80. *Aribam Tuleshwar Sharma v. Aribam Pishak Sharma*, (1979) 4 SCC 389; AIR 1979 SC 1047; *Patel Naranbhai v. Patel Gopaldas*, AIR 1972 Guj 229.

81. *Thungabhadra Industries Ltd. v. Govt. of A.P.*, AIR 1964 SC 1372, *Ujjam Bai v. State of U.P.*, AIR 1962 SC 1621 (1963) 1 SCR 778.

82. *Ifikhar Ahmad v. Bharat Kumar*, AIR 1957 Raj 165.

83. *Girdharlal v. Kapadvanj Municipality*, AIR 1930 Bom 317; *Patel Naranbhai Jinabhai v. Patel Gopaldas Venidas*, AIR 1972 Guj 229.

84. *Devji v. Dhanji*, AIR 1952 Kutch 45, *Mahabir Prasad v. Collector of Allahabad* *supra*.

85. *Chhajju Ram v. Neki* (1921-22) 49 IA 144; AIR 1922 PC 112, *Bisheshwar Pratap Sahi v. Parath Nath*, (1933-34) 61 IA 378; AIR 1934 PC 213.

Federal Court<sup>86</sup>, the Supreme Court<sup>87</sup> has held that the words "any other sufficient reason" must mean "a reason sufficient on grounds, at least analogous to those specified in the rule".

The following have been held to be sufficient reasons for granting review: where the statement in the judgment is not correct;<sup>88</sup> or where the decree or order has been passed under a misapprehension of the true state of circumstances;<sup>89</sup> or where a party had no notice or fair opportunity to produce his evidence;<sup>90</sup> or where the court had failed to consider a material issue, fact or evidence;<sup>91</sup> or where the court has omitted to notice or consider material statutory provisions;<sup>92</sup> or a ground which goes to the root of the matter and affects inherent jurisdiction of the court;<sup>93</sup> or misconception by the court of a concession made by the advocate;<sup>94</sup> or where a party's evidence has been closed owing to a misconception on the part of his pleader;<sup>95</sup> or a manifest wrong has been done and it is necessary to pass an order to do full and effective justice.<sup>96</sup>

The following, on the other hand, have been held not sufficient reasons for granting review: omission to frame an issue regarding the valuation of the suit;<sup>97</sup> or negligence or inadvertence on the part of the party or his pleader;<sup>98</sup> or absence of the party on the date of the hearing;<sup>99</sup> or subsequent events;<sup>100</sup> or failure of a party or his pleader to

86. *Hari Shankar v. Anath Nath*, AIR 1949 FC 106 at pp. 110-11.
87. *Moran Mar Basselios Catholicos v. Mar Poulouse Athanasius*, AIR 1954 SC 526 at p. 538 (AIR). See also *Raja Shatrunki v. Mohd. Azmat*, (1971) 2 SCC 200, at pp. 203-04 (SCC): at pp. 1475-76 (AIR); *Aribam Tuleshwar Sharma v. Aribam Pishak Sharma*, (1979) 4 SCC 389 at p. 390 (SCC): at p. 1048 (AIR).
88. *Bank of Bihar v. Mahabir Lal*, AIR 1964 SC 377 at p. 880. (1964) 1 SCR 842.
89. *Moran Mar Basselios Catholicos v. Mar Poulouse Athanasius*, AIR 1954 SC 526.
90. *Rajkishore Das v. Nilamani Das*, AIR 1968 Ori 140; *Kunjan v. Chandra Has*, AIR 1925 Oudh 266.
91. *Burma Shell Oil Storage Distributing Co. of India Ltd. v. Labour Appellate Tribunal*, AIR 1955 Cal 92; *C.C. Naidu v. Seva Transports Ltd.*, AIR 1953 Mad 39; *Rukhmabai v. Ganpatrao*, AIR 1932 Nag 177.
92. *Girdhari Lal v. D.H. Mehta*, (1971) 3 SCC 189; (1971) 3 SCR 748; *Hari Shankar v. Anath Nath*, AIR 1949 FC 106.
93. *Ayesha Bai v. Duleep Singh*, AIR 1961 Raj 186; *Harjit Singh v. Hardev Singh*, 1972 Cur LJ 158.
94. *Moran Mar Basselios Catholicos v. Mar Poulouse Athanasius*, AIR 1954 SC 526.
95. *Pridhanmal v. Laloo*, AIR 1931 Sind 3 (4).
96. *O.N. Mohindroo v. District Judge*, (1971) 3 SCC 5; (1971) 2 SCR 11 at p. 27; *Hari Shankar v. Anath Nath*, AIR 1949 FC 106.
97. *Pareswar Khuntia v. Amareswar Khuntia*, (1973) 39 Cut LT 24.
98. *Corpn. of Madras v. P.G. Arunachalam*, AIR 1974 Mad 288; *S. Anthony D'Costa v. Francis R. Anthony*, AIR 1962 Mad 304; *Manorath v. Atma Ram*, AIR 1934 Nag 187.
99. *Siva Subramania Chettiar v. Adaikkalam Chettiar*, AIR 1944 Mad 293; *Chatar Das v. Keshavdas*, AIR 1954 MB 3.
100. *Rajah Kotagiri Venkata Subbamma Rai v. Rajah Vellanki Venkatrama Rao*, (1899-1900) 27 IA 197 (PC).

raise a plea;<sup>101</sup> or that the case should have been argued differently;<sup>102</sup> or to enable the applicant to raise points which he could and ought to have raised at the former hearing;<sup>103</sup> or where the review is sought on the ground that if another opportunity were given to the applicant to establish his case, he could prove that the judgment of the court is wrong;<sup>104</sup> or that the case has been mismanaged by his counsel;<sup>105</sup> or that the court took a different view in a subsequent case.<sup>106</sup>

## 11. BY WHOM REVIEW MAY BE MADE?

Review is reconsideration of the same subject-matter by the same court and by the same judge. If the judge who has decided the matter is available he alone has jurisdiction to consider the case, and review the earlier order passed by him. He is best suited to remove any mistake or error apparent on the face of his own order. Moreover, he alone will be able to remember what was earlier argued before him and what was not urged. The law, therefore, insists that if he is available, he alone should hear the review petition.<sup>107</sup>

There may, however, be situations wherein this course is not possible. The same "judicial officer" may not be available. Death or such other unexpected or unavoidable causes might prevent the judge who passed the order from reviewing it. Such exceptional cases are allowable only *ex necessitate* and in those cases his successor or any other judge or court of concurrent jurisdiction may hear the review petitions and decide the same.<sup>108</sup>

101. *Ayesha Bai v. Duleep Singh*, AIR 1986 Raj 186; *Union of India v. Sudhir Kumar*, AIR 1975 Ori 64.

102. *Bhagwati v. Director of Consolidation*, AIR 1977 All 163, *Chhajju Ram v. Neki*, (1921-22) 49 IA 144; AIR 1922 PC 112.

103. *J.N. Surty v. T.S. Chettyar*, (1927-28) 55 IA 161. AIR 1928 PC 103, *Pitambar Mallik v. Ramchandra Prasad*, AIR 1968 Pat 320; *Ayesha Bai v. Duleep Singh*, AIR 1961 Raj 186, *S. Anthony D'Costa v. Francis R. Anthony*, AIR 1962 Mad 304.

104. *Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi*, (1980) 2 SCC 167 *Bhagwati v. Director of Consolidation*, AIR 1977 All 163.

105. *Pitambar Mallik v. Ramchandra Prasad*, AIR 1968 Pat 320; *S. Anthony D'Costa v. Francis R. Anthony*, AIR 1962 Mad 304.

106. Expln to R 1 as added by the Amendment Act, 1976 See also *Patel Naranbhai v. Patel Gopaldas*, AIR 1972 Guj 229.

107. S 114, Or 47 R 1, see also *Maharaja Moheshur Sing v. Bengal Govt.*, (1857-60) 7 Moo IA 283, *Devaraju Pillai v. Sellayya Pillai*, (1987) 1 SCC 61 AIR 1987 SC 1160 *State of Orissa v. Commr. of Land Records and Settlement*, (1998) 7 SCC 162 AIR 1999 SC 3067

108. *Ibid.* see also *Reliance Industries Ltd v. Pravinbhai*, (1997) 7 SCC 300 AIR 1997 SC 3892.

## 12. NO INHERENT POWER OF REVIEW

It is well-settled that the power of review is not an inherent power. It must be conferred by law either expressly or by necessary implication. If there is no power of review, the order cannot be reviewed. In such cases, the question whether the order is correct or valid in law does not arise for consideration.<sup>109</sup> It is, however, the duty of the court to correct grave and palpable errors committed by it.<sup>110</sup>

This principle applies to courts, tribunals, quasi-judicial authorities or administrative authorities exercising quasi-judicial powers. The principle has no application to decisions purely of an administrative nature. To extend the principle to pure administrative decisions would lead to untoward and startling results. The Government is free to alter its policy or its decisions in administrative matters. The administration cannot be hidebound by rules and restrictions of judicial procedure though of course they are bound to obey statutory provisions and also observe the principles of natural justice where rights of parties are affected. Finally, decisions of the Government are subject to judicial review and questioned in a competent court on all available grounds.<sup>111</sup>

## 13. COURT OF PLENARY JURISDICTION

A court of plenary jurisdiction, for instance, a writ court, has inherent power to review its orders to prevent miscarriage of justice or to correct grave and palpable errors committed by it.<sup>112</sup> If it is the final court of the country, it has the last opportunity to verify doubts and to undo injustice, if any, which might have occurred in the earlier order.<sup>113</sup> In appropriate cases, the power may be exercised *suo motu*.<sup>114</sup>

109. *Patel Narshi Thakershi v. Pradyuman Singhji*, (1971) 3 SCC 844: AIR 1970 SC 1273; *State of Assam v. J.N. Roy*, (1976) 1 SCC 234: AIR 1975 SC 2277; *Gram Panchayat, Kanonda v. Director, Consolidation of Holdings*, 1989 Supp (2) SCC 465: AIR 1990 SC 763; *Lily Thomas v. Union of India*, (2000) 6 SCC 224: AIR 2000 SC 1650; *Sunita Jain v. Pawan Kumar Jain*, (2008) 2 SCC 705; *Kalabharati Advertising v. Hemant Vimalnath Narichania*, (2010) 9 SCC 437.

110. *Shivdeo Singh v. State of Punjab*, AIR 1963 SC 1909; *Aribam Tuleshwar Sharma v. Aribam Pishak Sharma*, (1979) 4 SCC 389: AIR 1979 SC 1047; *R.S. Nayak v. A.R. Antulay*, (1984) 2 SCC 183; *Meera Bhanja v. Nirmala Kumari*, (1995) 1 SCC 170: AIR 1995 SC 455; *Surjit Singh v. Union of India*, (1997) 10 SCC 592; *United India Insurance Co. Ltd. v. Rajendra Singh*, (2000) 3 SCC 581: AIR 2000 SC 1165.

111. *R.R. Verma v. Union of India*, (1980) 3 SCC 402: AIR 1980 SC 1461.

112. *Shivdeo Singh v. State of Punjab*, AIR 1963 SC 1909.

113. *Union Carbide Corpn v. Union of India*, (1991) 4 SCC 584 (671-72): AIR 1992 SC 248.

114. For detailed discussion, see, under that head *infra*.

## 14. FORM OF APPLICATION

An application for review should be in the form of a memorandum of appeal.<sup>115</sup> The form of an application, however, is immaterial. The substance and not the form of an application is decisive.<sup>116</sup>

## 15. CRUCIAL DATE

The crucial date for determining whether or not the terms of the Code are satisfied is the date when the application for review is filled.<sup>117</sup>

## 16. SUO MOTU REVIEW

The power of review can be exercised by a court on an application by a "person aggrieved". The Code does not empower the court to exercise power of review *suo motu*.

It is settled principle of law that when a statute requires a particular thing to be done in a particular manner, it has to be done only in that manner and in no any other manner. "There is no provision either in Section 114 or in Order 47 of the Code providing for any *suo motu* review."<sup>118</sup>

In *R.S. Nayak v. A.R. Antulay*,<sup>119</sup> however, Mukharji, J. (as he then was) observed that the Supreme Court may exercise power of review *suo motu* in an appropriate case.

## 17. SUCCESSIVE APPLICATIONS

There cannot be successive review petitions one after the other. An order passed on an application for review is not open to review again and again.<sup>120</sup> A decision on review petition is also an "issue decided" which would operate *res judicata* in a subsequent petition unless there are different grounds.<sup>121</sup>

115. R 3.

116. *Raja Shatrunji v. Mohd. Azmat*, (1971) 2 SCC 200; AIR 1971 SC 1474.

117. *Thungabhadra Industries Ltd v. Govt of A.P.*, AIR 1964 SC 1372 (1964) 5 SCR 174, *Kannegolla Naghabhushanam v Land Acquisition Officer*, AIR 1993 AP 209.

118. *Danomal v. Union of India*, AIR 1967 Bom 355, *Jaya Devi v. State of Bihar*, (1996) 7 SCC 757; AIR 1996 SC 1174, *Viswanathan v. Muthuswamy Gounder*, AIR 1978 Mad 221, *Calcutta Properties Ltd v S N Chakraborty*, AIR 1988 Cal 131 (1987) 1 Cri LJ 535, *Vinod Chandra v Manilal*, (1994) 1 Guj LR 291 (1993) 2 Guj LH 1045.

119. (1984) 2 SCC 183.

120. *Lily Thomas v Union of India*, (2000) 6 SCC 224 AIR 2000 SC 1650, *Delhi Admn v Gurdip Singh*, (2000) 7 SCC 296 AIR 2000 SC 3737

121. *Ibid.* see also, Pt. II, Chap 2, *supra*.

The practice of filing indiscriminate review petitions or review petitions in the form of "clarification", "modification" or "recall" of order has also been deprecated by the Supreme Court.<sup>122</sup>

## 18. PROCEDURE AT HEARING

An application for review may be divided into the following three stages:<sup>123</sup>

### (i) First stage

An application for review commences ordinarily with an *ex parte* application by the aggrieved party. The court may reject it at once if there is no sufficient ground or may issue rule calling upon the opposite party to show cause why review should not be granted.<sup>124</sup>

### (ii) Second stage

The application for review shall then be heard by the same court and by the same judge who passed the decree or made the order, unless he is no longer attached to the court, or is precluded from hearing it by absence or other cause for a period of six months after the application.<sup>125</sup> If the rule is discharged, the case ends and the application will be rejected. If, on the other hand, the rule is made absolute, the application will be granted for rehearing of the matter.<sup>126</sup>

### (iii) Third stage

In the third stage, the matter will be reheard on merits by the court either at once or at any time fixed by it. After rehearing the case, the court may either confirm the original decree or vary it.<sup>127</sup>

The effect of allowing an application for review is to recall the decree already passed. Any order made subsequently whether reversing, confirming or modifying the decree originally passed will be a new decree superseding the original one.<sup>128</sup>

122. *Delhi Admn. v. Gurdip Singh*, (2000) 7 SCC 296: AIR 2000 SC 3737; *T.N. Electricity Board v. N. Raju Reddiar*, (1997) 9 SCC 736: AIR 1997 SC 1005; *Chhida Singh v. Director of Consolidation*, (1998) 3 SCC 441: AIR 1998 SC 2881.

123. *Sha Vadilal v. Sha Fulchand*, ILR (1906) 30 Bom 56: 7 Bom LR 664; *Maji Mohan v. State of Rajasthan*, AIR 1967 Raj 264.

124. R. 4(1).

125. R. 5.

126. R. 4(2).

127. R. 8.

128. *Sushil Kumar v. State of Bihar*, (1975) 1 SCC 774: AIR 1975 SC 1185.

## 19. LIMITATION

The period of limitation for an application for review of a judgment by a court other than the Supreme Court is thirty days from the date of the decree or order.<sup>129</sup>

## 20. APPEAL

An order granting an application for review is appealable, but an order rejecting an application is not appealable.<sup>130</sup> No second appeal lies from an order made in appeal from an order granting review.<sup>131</sup>

## 21. LETTERS PATENT APPEAL

An order refusing an application for review cannot be said to be a "judgment" and hence, no Letters Patent Appeal lies. But an order granting review may amount to judgment and a Letters Patent Appeal is competent.<sup>132</sup>

## 22. REVISION

An application for review can be said to be a "proceeding" and a decision thereon amounts to a "case decided" under the Code and such decision is revisable.<sup>133</sup>

## 23. REVIEW IN WRIT PETITIONS

After the amendment in Section 141 of the Code and insertion of Explanation to that section it is clear that the provisions of Order 47 of the Code do not apply to writ petitions filed in a High Court under Article 226 of the Constitution.<sup>134</sup>

There is nothing in Article 226 to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it.<sup>135</sup>

129. Art. 124, Limitation Act, 1963.

130. Or 43 R. 1(w), see also, Or 47 R 7

131. S 104(2)

132. *Sattemma v. Vishnu Murthy*, AIR 1964 AP 162, *Jwala Prasad v Jwala Bank Ltd.*, AIR 1961 All 381 (FB), *Devaraju Pillai v Selliavva Pillai*, (1987) 1 SCC 61 AIR 1987 SC 1160.

133. *Vidya Vati v Devi Das*, (1977) 1 SCC 293 at pp 296-97 AIR 1977 SC 397 at p 400, see also *infra*, "Revision", Chap 9

134. Expln to S 141

135. *Shevdeo Singh v State of Punjab*, AIR 1963 SC 1909, *Aribam Tuleshuwar Sharma v Aribam Pishak Sharma*, (1979) 4 SCC 389 AIR 1979 SC 1047, *Northern India Caterers*

At the same time, however, there are definitive limits to the exercise of the power of review. It cannot be forgotten that a review is not an appeal in disguise whereby an erroneous decision is reheard and corrected. This general rule applicable to civil proceedings would apply to proceedings under Article 226 of the Constitution as well.<sup>136</sup>

While exercising the power of review, a High Court may bear in mind the following principles:<sup>137</sup>

- (i) The provisions of the Civil Procedure Code in Order 47 are not applicable to the High Court's power of review in proceedings under Article 226 of the Constitution.
- (ii) The said powers are to be exercised by the High Court only to prevent miscarriage of justice or to correct grave and palpable errors. (The epithet "palpable" means that which can be felt by a simple touch of the order and not which could be dug out after a long drawn out process of argumentation and ratiocination.)
- (iii) The inherent powers, though *ex facie* plenary, are not to be treated as unlimited or unabridged but they are to be invoked on the grounds analogous to the grounds mentioned in Order 47 Rule 1.<sup>138</sup>

## 24. REVIEW BY SUPREME COURT

The provisions of Order 47 apply to orders passed under the Code of Civil Procedure. Article 137 of the Constitution confers power on the Supreme Court to review its judgments subject to the provisions of any law made by Parliament or the Rules made under Article 145. The power of the Supreme Court, therefore, cannot be curtailed by the Code of Civil Procedure.<sup>139</sup>

## 25. CONCLUDING REMARKS

It is submitted that the following observations of Pathak, J. (as he then was) in the leading case of *Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi*<sup>140</sup> lay down the correct principle of law on the power of review and, therefore, are worth quoting:

"The normal principle is that a judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances

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(India) Ltd. v. Lt. Governor of Delhi, (1980) 2 SCC 167. AIR 1980 SC 674.

136. *Ibid*, see also *R.S. Nayak v. A.R. Antulay*, (1984) 2 SCC 183.

137. *Gujarat University v. Sonal P. Shah*, AIR 1982 Guj 58: (1982) 23 (1) Guj LR 171 (FB).

138. *Ibid*, at p. 62 (AIR).

139. Art. 137, Constitution of India, Or. 40, Supreme Court Rules, 1966 For detailed discussion, see, V.G. Ramachandran, *Law of Writs* (2006) Vol. II, Pt. V, Chap. 2.

140. (1980) 2 SCC 167: AIR 1980 SC 674.

of a substantial and compelling character make it necessary to do so ... [W]hatever the nature of the proceeding, it is beyond dispute that a review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the court will not be reconsidered *except where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility.*"<sup>141</sup> (emphasis supplied)

141. *Ibid.*, at p. 172 (SCC); at p. 678 (AIR). See also, Authors' *Lectures on Administrative Law* (2008) Lecture VII.

## CHAPTER 9

### Revision

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#### 1. GENERAL

Section 115 of the Code of Civil Procedure empowers a High Court to entertain a revision in any case decided by any subordinate court in

certain circumstances. This jurisdiction is known as revisional jurisdiction of the High Court.

## 2. REVISION: MEANING

According to the dictionary meaning, "to revise" means "to look again or repeatedly at"; "to go through carefully and correct where necessary", "to look over with a view to improving or correcting". "Revision" means "the action of revising, especially critical or careful examination or perusal with a view to correcting or improving".<sup>1</sup>

## 3. SECTION 115

Section 115 invests all High Courts with revisional jurisdiction. It reads as under:

**"115. Revision.—**(1) The High Court may call for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears:

- (a) to have exercised a jurisdiction not vested in it by law, or
- (b) to have failed to exercise a jurisdiction so vested, or
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit:

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any court subordinate thereto.

(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

*Explanation.—*In this section, the expression, 'any case which has been decided' includes any order made, or any order deciding an issue, in the course of a suit or order proceeding."

## 4. NATURE AND SCOPE

Section 115 authorises the High Court to satisfy itself on three matters:

(a) that the order of the subordinate court is within jurisdiction; (b) that

1 *Shorter Oxford English Dictionary* (1990) Vol II at p 1821, *Concise Oxford English Dictionary* (2002) at p 1226, *Chamber's 21st Century Dictionary* (1997) at p 1197, *Random House Dictionary* (1970) at p 1227, *Ram Sarup v Shikhar Chand*, AIR 1961 All 221 at p 227 1960 All LJ 810 1961 All WR 32 (FB), *Shankar Ramchandra Abhvankar v Krishnaji Dattatreya Bapat*, (1969) 2 SCC 74 AIR 1970 SC 1.

the case is one in which the court ought to exercise its jurisdiction; and (c) that in exercising jurisdiction the court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision.<sup>2</sup>

If the High Court is satisfied with these three matters, it has no power to interfere because it differs, however profoundly, from the conclusion of the subordinate court on questions of fact or of law.<sup>3</sup> It is well-established that where there is no question of jurisdiction the decision cannot be corrected for a court has jurisdiction to decide wrongly as well as rightly.<sup>4</sup>

In *Major S.S. Khanna v. Brig. F.J. Dillon*<sup>5</sup>, Shah, J. (as he then was) stated, "The section consists of two parts, the first prescribes the conditions in which jurisdiction of the High Court arises, i.e. there is a case decided by a subordinate court in which no appeal lies to the High Court, the second sets out the circumstances in which the jurisdiction may be exercised."

Hidayatullah, J. (as he then was) also observed that "the section is concerned with jurisdiction and jurisdiction alone involving a refusal to exercise jurisdiction where one exists or an assumption of jurisdiction where none exists and lastly acting with illegality or material irregularity".<sup>6</sup>

In *Pandurang Ramchandra Mandlik v. Maruti Ramchandra Ghatge*<sup>7</sup>, Gajendragadkar, J. (as he then was) rightly propounded:

"The provisions of S. 115 of the Code have been examined by judicial decisions on several occasions. While exercising its jurisdiction under S. 115, it is not competent to the High Court to correct errors of fact, however gross they may be, or even errors of law, unless the said errors have relation to the jurisdiction of the court to try the dispute itself. As cls. (a), (b) and (c) of

2. *Keshardeo v. Radha Kissen*, AIR 1953 SC 23 at pp. 27-28; 1953 SCR 136; *Chaube Jagdish Prasad v. Ganga Prasad Chaturvedi*, AIR 1959 SC 492; 1959 Supp (1) SCR 733; *Major S.S. Khanna v. Brig. F.J. Dillon*, AIR 1964 SC 497; (1964) 4 SCR 409; *Manick Chandra v. Debdas Nandy*, (1986) 1 SCC 512 at pp. 516-17; AIR 1986 SC 446; *Pandurang Dhondi v. Maruti Hari*, AIR 1966 SC 153 at p. 155; (1966) 1 SCR 102; *D.L.F. Housing and Construction Co (P) Ltd. v. Sarup Singh*, (1969) 3 SCC 807; AIR 1971 SC 2324; *M.L. Sethi v. R.P. Kapoor*, (1972) 2 SCC 427; AIR 1972 SC 2379; *Sk. Jaffar v. Mohd. Pasha*, (1975) 1 SCC 25 at pp. 27-28; AIR 1975 SC 794 at p. 796; *Johri Singh v. Sukh Pal Singh*, (1989) 4 SCC 403 at pp. 416-17; AIR 1989 SC 2073.
3. *N.S. Venkatagiri Ayyangar v. Hindu Religious Endowments Board*, (1948-49) 76 IA 67; AIR 1949 PC 156; *Keshardeo Chamria v. Radha Kissen Chamria*, AIR 1953 SC 23; *M.L. Sethi v. R.P. Kapoor*, (1972) 2 SCC 427.
4. *Major S.S. Khanna v. Brig. F.J. Dillon*, AIR 1964 SC 497 at p. 505 (AIR). See also, observations of Lord Hobhouse in *Malkarjun Bin Shidramappa v. Narhari Bin Shivappa*, (1899-1900) 27 IA 216; ILR (1901) 25 Bom 337 (PC), 568.
5. AIR 1964 SC 497 at pp. 499-500; (1964) 4 SCR 409.
6. *Major S.S. Khanna v. Brig. F.J. Dillon*, AIR 1964 SC 497; (1964) 4 SCR 409.
7. AIR 1966 SC 153; (1966) 1 SCR 102.

S. 115 indicate, it is only in cases where the subordinate court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked. It is conceivable that points of law may arise in proceedings instituted before subordinate courts which are related to questions of jurisdiction. It is well-settled that a plea of limitation or a plea of *res judicata* is a plea of law which concerns the jurisdiction of the Court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the Court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of S. 115 of the Code. But an erroneous decision on a question of law reached by the subordinate court which has no relation to questions of jurisdiction of that Court, cannot be corrected by the High Court under S. 115."<sup>8</sup> (emphasis supplied)

## 5. OBJECT

The underlying object of Section 115 is to prevent subordinate courts from acting arbitrarily, capriciously and illegally or irregularly in the exercise of their jurisdiction. It clothes the High Court with the powers to see that the proceedings of the subordinate courts are conducted in accordance with law within the bounds of their jurisdiction and in furtherance of justice.<sup>9</sup> It enables the High Court to correct, when necessary, errors of jurisdiction committed by subordinate courts and provides the means to an aggrieved party to obtain rectification of a non-appealable order. In other words, for the effective exercise of its superintending and visitorial powers, revisional jurisdiction is conferred upon the High Court.<sup>10</sup>

At the same time, however, the judges of the lower courts have perfect jurisdiction to decide a case, and even if they decide wrongly, they do not commit "jurisdictional error". Revisional jurisdiction is not intended to allow the High Court to interfere and correct errors of fact or of law.<sup>11</sup>

8. *Ibid.*, at p. 155 (AIR).

9. *Major S. S. Khanna v. Brig F J Dillon*, AIR 1964 SC 497 at p. 505 (1964) 4 SCR 409. *Baldevdas v. Filmistan Distributors (India) (P) Ltd.*, (1969) 2 SCC 201 AIR 1970 SC 406.

10. *Ibid.*, see also *Manick Chandra v. Dehdas Nandy*, (1986) 1 SCC 512 at pp. 516-17 AIR 1986 SC 446.

11. *Rajah Amir Hassan v. Sheo Baksh Singh*, (1883-84) 11 IA 237 ILR (1885) 11 Cal 6 (PC). *N S Venkataswami Ayyangar v. Hindu Religious Endowments Board*, (1948-49) 76 IA 67. AIR 1949 PC 156, *Keshardeo Chamria v. Radha Kissen Chamria*, AIR 1953 SC 23. see also *supra*, "Nature and scope".

6. REVISION AND APPEAL<sup>12</sup>7. REVISION AND SECOND APPEAL<sup>13</sup>8. REVISION AND REFERENCE<sup>14</sup>9. REVISION AND REVIEW<sup>15</sup>

## 10. REVISION AND WRIT

The revisional power under Section 115 of the Code is clearly in the nature of a power to issue a writ of *certiorari*.<sup>16</sup> It is, however, not as wide as *certiorari* since it can be exercised only in the case of a jurisdictional error and not in the case of any other error. Power of the High Court in revision is not in any manner wider than the power under Article 226 of the Constitution.

Again, if the petitioner has already filed a revision in the High Court under Section 115 and has obtained an order, he cannot thereafter invoke the jurisdiction of the High Court under Article 226. If there are two modes of invoking the jurisdiction of the High Court and one of those modes has been chosen and exhausted, it would not be a proper and sound exercise of discretion to grant relief in the other set of proceedings in respect of the same order of the subordinate court.<sup>17</sup>

In *Major S.S. Khanna v. Brig. F.J. Dillon*<sup>18</sup> Hidayatullah, J. (as he then was) stated, "The power given by S. 115 of the Code is clearly limited to the keeping of the subordinate courts within the bounds of their jurisdiction. It does not comprehend the power exercisable under the writ of prohibition or *mandamus*. It is also not a full power of *certiorari* inasmuch as it arises only in a case of jurisdiction and not in a case of error... Where there is no question of jurisdiction, the decision cannot be corrected for it has been ruled that a court has jurisdiction to decide wrongly as well as rightly. But once a flaw of jurisdiction is found the High Court need not quash and remit as is the practice in English Law under the writ of *certiorari* but pass such order as it thinks fit."<sup>19</sup>

12. See *supra*, "Appeal and Revision", Chap. 2. See also *infra*, under that head.

13. See *infra*, "Second Appeal and Revision".

14. See *infra*, "Reference and Revision". 15. See *infra*, "Review and Revision".

16. *Major S.S. Khanna v. Brig. F.J. Dillon*, AIR 1964 SC 497 at pp. 504-05; (1964) 4 SCR 409.

17. *Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat*, (1969) 2 SCC 74; AIR 1970 SC 1.

18. AIR 1964 SC 497; (1964) 4 SCR 409.

19. *Ibid*, at p. 505 (AIR). For detailed discussion of writs, see, V.G. Ramachandran, *Law of Writs* (2006) Vol. I, Pt. II, Chaps. 1-5; see also Authors' *Lectures on Administrative*

## 11. REVISION AND POWER OF SUPERINTENDENCE

A revision under Section 115 of the Code and a petition under Article 227 of the Constitution are two separate and distinct proceedings. One cannot be identified with the other.<sup>20</sup>

*Firstly*, while the revisional power is only judicial, the power of superintendence is both judicial as well as administrative. *Secondly*, the revisional power is statutory and it can be taken away by a legislation. But the power of superintendence is constitutional and cannot be taken away or curtailed by a statute. *Finally*, the revisional powers of the High Court are restricted and can be exercised on all the conditions laid down in Section 115 of the Code being fulfilled, none of those restrictions apply to exercise of supervisory powers of the High Court under Article 227 of the Constitution.<sup>21</sup>

But once a party chooses to invoke revisional jurisdiction of the High Court and exhausts that remedy, he cannot be allowed to press in aid supervisory jurisdiction thereafter. Where there are two modes of invoking the jurisdiction of a court, tribunal or authority and an aggrieved party chooses and exhausts one of the remedies, it would not be proper and sound exercise of discretion to grant relief in the other set of proceedings. The refusal to grant relief in such circumstances would be in consonance with the anxiety of the court to prevent abuse of the process of law as also to respect and accord finality to its own decisions.<sup>22</sup>

## 12. CONVERSION OF REVISION INTO APPEAL<sup>23</sup>

### 13. APPEAL, REFERENCE, REVIEW AND REVISION: DISTINCTION

#### (1) Appeal and revision

- (a) An appeal lies to a superior court, which may not necessarily be a High Court, while a revision application under the Code lies only to the High Court.

*Law (2012) Lecture IX.*

20. *Ibid*, see also *Vishesh Kumar v. Shanti Prasad*, (1980) 2 SCC 378 at p 387 AIR 1980 SC 892 at p 897, *Satyanarayan v. Mallikarjun Bhavanappa*, AIR 1960 SC 137 (1960) 1 SCR 890; *Major S.S. Khanna v. Brig F J Dillon*, AIR 1964 SC 497, *Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat*, (1969) 2 SCC 74
21. *Jetha Bai & Sons v. Sunderdas*, (1988) 1 SCC 722. AIR 1988 SC 812 For detailed discussion of supervisory jurisdiction of High Courts, see, *Authors' Lectures on Administrative Law (2012) Lecture IX*, see also, V.G. Ramachandran, *Law of Writs (2006) Vol II Pt IV, Chap. 1*
22. *Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat*, (1969) 2 SCC 74 AIR 1970 SC 1
23. See *supra*, "Conversion of Appeal into Revision", Chap 2

- (b) An appeal lies only from the decrees and appealable orders, but a revision application lies from any decision of a court subordinate to the High Court from which no appeal (either first appeal or second appeal or appeal from an order) lies to the High Court or to any subordinate court.
- (c) A right of appeal is a substantive right conferred by the statute, while the revisional power of the High Court is purely discretionary.
- (d) An appeal abates if the legal representatives of a deceased party are not brought on record within the prescribed period. A revision application, however, does not abate in such cases. The High Court may at any time bring the proper parties on the record of the case.
- (e) The grounds for an appeal and a revision application are also different. A revision application lies only on the ground of jurisdictional error. An appeal lies on a question of fact or of law or of fact and law.
- (f) Filing of an application is not necessary in case of revision. An aggrieved party may invoke the jurisdiction of the High Court by filing an application or the High Court may exercise the revisional jurisdiction even *suo motu* (of its own motion). In case of appeal, on the other hand, a memorandum of appeal must be filed before the appellate court by the aggrieved party.

## (2) First appeal and second appeal

- (a) Whereas a first appeal lies from a decree passed by a court exercising original jurisdiction, a second appeal lies from a decree passed by a court exercising appellate jurisdiction.
- (b) A first appeal lies to a superior court, which may or may not be a High Court, whereas a second appeal lies only in the High Court.
- (c) The grounds of first appeal and second appeal are different. Whereas a first appeal can be filed on a question of fact, or of law, or of fact and law, a second appeal can lie only on a substantial question of law.
- (d) Where the amount of a decree does not exceed three thousand rupees, a first appeal is maintainable on a question of law, but a second appeal does not lie in such cases.
- (e) In a first appeal an appellate court has power to decide issues of fact, but in a second appeal a High Court can decide issues of fact only in certain cases. (Section 103)
- (f) The period of limitation for filing a first appeal is ninety days in case such an appeal lies to a High Court and thirty days if it lies

in any other court. A second appeal, however, can be filed only in a High Court within ninety days.

- (g) A letters patent appeal is maintainable against a "judgment" of a Single judge of a High Court to a Division Bench of the same Court, but no such appeal is maintainable against a decision of a Single Judge in a second appeal. (Section 100-A)

### (3) Second appeal and revision

- (a) A second appeal lies to the High Court on the ground of a substantial question of law, while a revision application lies on the ground of jurisdictional error.
- (b) The revisional powers of the High Court can be invoked only in those cases in which no appeal (either first appeal or second appeal or appeal from an order) lies to the High Court or to any subordinate court. The second appeal lies only in the High Court under Section 100 of the Code.
- (c) While exercising revisional jurisdiction the High Court cannot interfere with an order passed by the subordinate court, if it is within its jurisdiction even if it is legally wrong. The High Court, on the other hand, can interfere with a decree passed by the lower appellate court if it is contrary to law.
- (d) The High Court cannot decide a question of fact in the exercise of its revisional jurisdiction, while it can decide a question of fact in the second appeal in certain circumstances.
- (e) The High Court may decline to interfere in revision if it is satisfied that substantial justice has been done. In the second appeal, however, the High Court has no discretionary power and it cannot refuse to grant relief *merely* on equitable grounds.

### (4) Appeal and reference

- (a) A right of appeal is a right conferred on the suitor, while the power of reference is vested in the court.
- (b) Reference is always made to the High Court. An appeal can be filed to a superior court which need not necessarily be a High Court.
- (c) The grounds of appeal are wider than the grounds of reference.
- (d) Reference is always made pending a suit, appeal or execution proceedings, while an appeal can only be filed after the decree is passed or an appealable order is made.

**(5) Appeal and review**

- (a) An appeal lies to the superior court, while a review lies to the same court.
- (b) Review of a judgment involves reconsideration of the same subject-matter by the same judge, while an appeal is heard by a different judge.
- (c) The grounds of appeal are wider than the grounds of review.
- (d) A second appeal lies on a substantial question of law. A second review application, however, does not lie.

**(6) Reference and review**

- (a) In reference, it is the subordinate court and not the party which refers the case to the High Court. In case of review, the application is made by the aggrieved party.
- (b) The High Court alone can decide matters on reference. Review, on the other hand, is by the court which passed the decree or made the order.
- (c) Reference is made pending a suit, appeal or execution proceedings, while an application for review can be made only after the decree is passed or order is made.
- (d) The grounds for reference and review are different.

**(7) Reference and revision**

- (a) In reference, the case is referred to the High Court by a court subordinate to it. In case of revision, the jurisdiction of the High Court is invoked either by the aggrieved party or by the High Court *suo motu*.
- (b) The grounds of reference relate to reasonable doubt on a question of law, while the grounds for revision relate to jurisdictional errors of the subordinate court.

**(8) Review and revision**

- (a) Revisional jurisdiction can only be exercised by the High Court, while the power of review can be exercised by the very court which passed the decree or made the order.
- (b) Revisional power can be exercised by the High Court only in a case where no appeal lies to the High Court, but review can be made even when an appeal lies to the High Court.

- (c) Revisional powers can be exercised by the High Court even *suo motu* (of its own motion), but for review an application has to be made by an aggrieved party.
- (d) The powers of revision and review can be exercised on different grounds.
- (e) The order granting review is appealable, but an order passed in the exercise of revisional jurisdiction is not appealable.

#### (9) Revision and writ

- (a) Revisional jurisdiction can be exercised by the High Court under Section 115 of the Code of Civil Procedure, 1908 while writ jurisdiction can be exercised by the High Court under Article 226 (or by the Supreme Court under Article 32) of the Constitution of India.
- (b) Revisional jurisdiction of the High Court is not as wide as the jurisdiction under a writ of *certiorari*.
- (c) If a party has invoked revisional jurisdiction of the High Court, he cannot thereafter invoke the jurisdiction of the High Court under Article 226 of the Constitution.

### 14. LAW COMMISSION'S VIEW

According to Law Commission, while dealing with revisional jurisdiction, a High Court should bear in mind the following rules:<sup>24</sup>

- (1) *Rule nisi* should not be issued except upon a very careful and strict scrutiny;
- (2) Where no stay is granted, record of subordinate court should not be called for; and even where record is necessary, only copies of thereof should be required to be produced; and
- (3) Whenever stay is granted, every effort should be made to dispose of revision within two to three months.

### 15. WHO MAY FILE?

A person aggrieved by an order passed by a court subordinate to the High Court may file a revision against such order.<sup>25</sup> But the High Court may even *suo motu* exercise revisional jurisdiction under Section 115 of the Code.<sup>26</sup>

24 Report of Civil Justice Committee at p. 281, para 4.

25 *Madanlal Tiwari v. Bengal Nagpur Cotton Mills Ltd.*, AIR 1964 MP 297, *Raundar Singh v. Karnal Central Coop. Bank Ltd.*, AIR 1965 Punj 331.

26 For detailed discussion, see *infra*, "Suo motu exercise of power"

## 16. CONDITIONS

The following conditions must be satisfied before revisional jurisdiction can be exercised by the High Court:

- (i) a case must have been decided;
- (ii) the court which has decided the case must be a court subordinate to the High Court;
- (iii) the order should not be an appealable one; and
- (iv) the subordinate court must have (a) exercised jurisdiction not vested in it by law; or (b) failed to exercise jurisdiction vested in it; or (c) acted in the exercise of its jurisdiction illegally or with material irregularity.<sup>27</sup>

### (i) Case decided

The expression "*case decided*" was not defined in the Code of 1908. It gave rise to a number of conflicting decisions on the question whether the said expression included an interlocutory order also. But the conflict was ultimately resolved by the Supreme Court in the case of *Major S.S. Khanna v. Brig. F.J. Dillon*<sup>28</sup>, holding that Section 115 applies even to interlocutory orders. In that case, Shah, J. (as he then was) observed:

"The expression 'case' is a word of comprehensive import; it includes civil proceedings other than suits, and is not restricted by anything contained in the section to the entirety of the proceeding in a civil court. To interpret the expression 'case' as an entire proceeding only and not a part of proceeding would be to impose a restriction upon the exercise of powers of superintendence which the jurisdiction to issue writs, and the supervisory jurisdiction are not subject to, and may result in certain cases in denying relief to an aggrieved litigant where it is most needed, and may result in the perpetration of gross injustice."<sup>29</sup> (emphasis supplied)

Explaining the ratio laid down in *Major Khanna*<sup>30</sup>, the Supreme Court in *Baldevdas Shivalal v. Filmistan Distributors (India) (P) Ltd.*,<sup>31</sup> held that a case may be said to have been decided if the court adjudicates for the purpose of the suit some right or obligation of the parties in controversy. Every order in the suit cannot be regarded as a case decided within the meaning of Section 115 of the Code.

27. *Chaube Jagdish Prasad v. Ganga Prasad Chaturvedi*, AIR 1959 SC 492; 1959 Supp (1) SCR 733; *Major S.S. Khanna v. Brig. F.J. Dillon*, AIR 1964 SC 497 (1964) 4 SCR 409; *Pandurang Dhondi v. Maruti Hari*, AIR 1953 SC 153; see also *Baldevdas v. Filmistan Distributors (India) (P) Ltd.*, (1969) 2 SCC 201; AIR 1970 SC 406.

28. AIR 1964 SC 497; (1964) 4 SCR 409.

29. *Ibid*, at p. 501 (AIR) (per Shah, J.).

30. *Major S.S. Khanna v. Brig. F.J. Dillon*, AIR 1964 SC 497; (1964) 4 SCR 409.

31. (1969) 2 SCC 201 at p. 206; AIR 1970 SC 406 at p. 407.

On the recommendation of the Joint Committee of Parliament, an Explanation has been added to Section 115 by the Amendment Act of 1976 which makes it clear that the expression "case decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding".<sup>32</sup> Thus, the expression "any case which has been decided" after the Amendment Act of 1976 means "each decision which terminates a part of the controversy involving the question of jurisdiction".<sup>33</sup>

## (ii) Subordinate court

The High Court cannot exercise revisional jurisdiction unless the case is decided by a court and such court is subordinate to the High Court. A court means a court of civil judicature. It does not include any person acting in an administrative capacity.

As a general rule, where it is provided that a matter should be decided by a particular *court*, the presiding officer of such court will act as a *court*. But where it is provided that a particular *judge* should decide a matter, the provisions of the statute will have to be considered for the purpose of determining whether the judicial officer acts as a court or as a *persona designata*.<sup>34</sup>

It is the intention that determines the question. If the intention is that the prescribed officers should enforce the rights and liabilities created by the statute in the exercise of the existing jurisdiction of courts, they act as courts. If, on the other hand, the intention is to create new courts, they act as *persona designata*.<sup>35</sup>

Again, while judicial functions are essential for a court,<sup>36</sup> the mere fact that a person exercises judicial functions is not sufficient to constitute him a court.<sup>37</sup> Further, a court will be said to be subordinate to the High Court, when it is subject to its appellate jurisdiction.<sup>38</sup> However, the mere fact that a statute provides an appeal to a court from a particular body does not necessarily constitute that body as a court.<sup>39</sup>

32. *Tata Iron & Steel Co. v. Rajarishi Exports (P) Ltd*, AIR 1978 Ori 179 at p. 180.

33. *Gulam Rasool v. Mariyam*, AIR 1980 Raj 197 at p. 199.

34. *Central Talkies Ltd. v. Dwarka Prasad*, AIR 1961 SC 606 at p. 609 (1961) 3 SCR 495, *Ram Chandra v. State of U P*, AIR 1966 SC 1888 at pp. 1889-90: 1966 Supp SCR 193, *Surindra Mohan v. Dharam Chand Abrol*, AIR 1971 J&K 76 at pp. 78, 80 (FB), *Chatur Mohan v. Ram Behari*, AIR 1964 All 562 at p. 566

35. *National Telephone Co. Ltd. v. HM Postmaster General*, 1913 AC 546 (HL), *Surindra Mohan v. Dharam Chand Abrol*, AIR 1971 J&K 176; *Mukri Gopalan v. Cheppilat Puthanpurayil Aboobaeker*, (1995) 5 SCC 5

36. *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.*, AIR 1949 PC 129 (133)

37. *National Federation of Railway v. E I Railway Admn.*, AIR 1950 All 80 at p. 81.

38. *Spring Mills Ltd. v. G D Ambekar*, AIR 1949 Bom 188

39. *C. Abboy Reddiar v. Collector of Chingleput*, AIR 1952 Mad 45 at p. 46.

### (iii) No appeal lies

The revisional jurisdiction of the High Court can be invoked in respect of any case in which no appeal lies to the High Court.<sup>40</sup> The word "appeal" includes first appeal as well as second appeal. Therefore, where an appeal lies to the High Court either directly or indirectly, revision under Section 115 does not lie. On the other hand, where no first or second appeal lies to the High Court, the revision is competent.

As has been rightly observed by the Supreme Court in the case of *Major S.S. Khanna v. Brig. F.J. Dillon*<sup>41</sup>, "If an appeal lies against the adjudication directly to the High Court, or to another court from the decision of which an appeal lies to the High Court, it has no power to exercise its revisional jurisdiction, but where the decision itself is not appealable to the High Court directly or indirectly, exercise of the revisional jurisdiction by the High Court would not be deemed excluded."<sup>42</sup>

### (iv) Jurisdictional error

#### (a) Nature and scope

The power conferred by Section 115 of the Code is clearly limited to the keeping of subordinate courts within the bounds of their jurisdiction. Section 115 is concerned with jurisdiction and jurisdiction alone involving a refusal to exercise jurisdiction where one exists, an assumption of jurisdiction where none exists, and lastly, acting with illegality or material irregularity. Where there is no question of jurisdiction in this manner, the decision cannot be corrected because a court has jurisdiction to decide wrongly as well as rightly.<sup>43</sup>

#### (b) Error of fact and error of law

As stated above, the revisional powers of the High Court are limited to the question of jurisdiction only and the decision of the subordinate court on all questions of law and fact *not touching its jurisdiction* is final.<sup>44</sup> (emphasis supplied)

40. *Vidya Vati v. Devi Das*, (1977) 1 SCC 293 at pp. 296-97; AIR 1977 SC 397 at p. 400; *Sunderlal v. Paramsukhdas*, AIR 1968 SC 366 at p. 371; (1968) 1 SCR 362; *Manick Chandra v. Debdas Nandy*, (1986) 1 SCC 512; AIR 1986 SC 446.

41. AIR 1964 SC 497 (1964) 4 SCR 409.

42. *Ibid*, at p. 501 (AIR). See also *Custodian of E.P. v. Nasir Uddin*, AIR 1962 Punj 218 (FB); *Paruchuru Thirumala Satyanarayana v. Vannava Ramalingam*, AIR 1952 Mad 86 (FB); *B. Manmohan Lal v. B. Raj Kumar Lal*, AIR 1946 All 89 (FB).

43. *Per* Hidayatullah, J. in *Major S.S. Khanna v. Brig. F.J. Dillon*, AIR 1964 SC 497 at p. 505 (AIR). See also *supra*, "Nature and scope"; *Manick Chandra Nandy v. Debdas Nandy*, (1986) 1 SCC 512.

44. *S. Rama Iyer v. Sundaresa Ponnappoondar*, AIR 1966 SC 1431 at p. 1432; (1966) 3 SCR 474.

In other words, Section 115 is not directed against conclusions of law or fact in which the question of jurisdiction is not involved.<sup>45</sup>

(c) Error of law and error of jurisdiction

There is, however, a distinction between cases in which on a wrong decision the court has assumed jurisdiction which is not vested in it and those in which in exercise of its jurisdiction the court has arrived at a conclusion erroneous in law or in fact. In the former class of cases, revisional power is permissible, while in the latter class of cases it is not.<sup>46</sup> Thus, if by an erroneous decision on a question of fact or law touching its jurisdiction, e.g. on a preliminary or jurisdictional fact upon the existence of which its jurisdiction depends, the subordinate court assumes a jurisdiction not vested in it by law or fails to exercise a jurisdiction so vested, its decision is not final, and is subject to the revisional jurisdiction of the High Court under Section 115.<sup>47</sup> (As observed by the Privy Council<sup>48</sup>, wherever jurisdiction is given to a court by an Act of Parliament and such jurisdiction is only given upon certain specified terms contained in that Act, it is a universal principle that these terms must be complied with in order to create and raise the jurisdiction, for if they be not complied with, the jurisdiction does not arise.)

In the leading case of *R. v. Commr. for Special Purposes of Income Tax*<sup>49</sup>, Lord Esher, M.R. observed:

"When an inferior court or tribunal or body which has to exercise the power of deciding facts is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction."<sup>50</sup>

45. *J.R. Datar v. Dattatraya Balwant*, C.A. 585 of 1964, decided on 7-9-1966, *Pandurang Dhondi v. Maruti Hari*, AIR 1966 SC 153; *D L F Housing and Construction Co (P) Ltd. v. Sarup Singh*, (1969) 3 SCC 807; *M.L. Sethi v. R.P. Kapoor*, (1972) 2 SCC 427, *M K Palanippa v. A. Pennuswami*, (1970) 2 SCC 290 at pp. 292-93.

46. *N S. Venkatagiri Ayyangar v. Hindu Religious Endowments Board*, (1948-49) 76 IA 67 AIR 1949 PC 156. *Joy Chand v. Kamalaksha*, (1948-49) 76 IA 131 AIR 1949 PC 239. *Ratilal v. Ranchhodhai*, AIR 1966 SC 439 at pp. 441-42. *Vora Abbasbhai v. Gulamnabi*, AIR 1964 SC 1341 at pp. 1347-48 (1964) 5 SCR 157.

47. *J R Datar v. Dattatraya Balwant*, C A 585 of 1964, decided on 7-9-1966, *Pandurang Dhondi v. Maruti Hari*, AIR 1966 SC 153, *D L F Housing and Construction Co (P) Ltd v. Sarup Singh*, (1969) 3 SCC 807; *M L Sethi v R P Kapoor*, (1972) 2 SCC 427, *M K Palanippa v. A. Pennuswami*, (1970) 2 SCC 290 at p. 292-93.

48. *Nusserwanjee Pestonjee v. Meer Mynnoodeen Khan*, (1855) 6 MIA 134.

49. (1888) 21 QB 313; 36 WR 776.

50. *Ibid.* at p. 319. See also *Chauhe Jagdish Prasad v. Ganga Prasad Chaturvedi*, AIR 1959 SC 492 1959 Supp (1) SCR 733, *Mohd. Hasnuddin v. State of Maharashtra*, (1979) 2

It is submitted that the following observations of the Supreme Court in the case of *Mohd. Hasnuddin v. State of Maharashtra*<sup>51</sup> lay down correct law on the point and, therefore, are worth quoting:

"Every tribunal of limited jurisdiction is not only entitled but bound to determine whether the matter in which it is asked to exercise its jurisdiction comes within the limits of its special jurisdiction and whether the jurisdiction of such tribunal is dependent on the existence of certain facts or circumstances. Its obvious duty is to see that these facts and circumstances exist to invest it with jurisdiction, and where a tribunal derives its jurisdiction from the statute that creates it and that statute also defines the conditions under which the tribunal can function, it goes without saying that *before that tribunal assumes jurisdiction in a matter, it must be satisfied that the conditions requisite for its acquiring seisin of that matter have in fact arisen.*"<sup>52</sup> (emphasis supplied)

(d) Exercise of jurisdiction not vested by law: Clause (a)

Where a subordinate court exercises jurisdiction not vested in it by law, a revision lies. In such cases, a subordinate court assumes jurisdiction which it does not possess by misconstruing statutory provisions or by wrongly assuming existence of preliminary or collateral facts which do not exist. The High Court in such cases will interfere with the orders passed by a subordinate court.<sup>53</sup>

The following cases have been held to be cases of unauthorised assumption of jurisdiction by the subordinate court: (i) where the lower court assumes jurisdiction which it does not possess on account of the pecuniary or territorial limits or by reason of the subject-matter of the suit;<sup>54</sup> or (ii) entertains an appeal from an order which is not appealable;<sup>55</sup> or (iii) entertains a suit or appeal which it has no jurisdiction to entertain;<sup>56</sup> or (iv) makes an order which it has no jurisdiction to

SCC 572.

51. (1979) 2 SCC 572. AIR 1979 SC 404

52. *Mohd. Hasnuddin v. State of Maharashtra*, (1979) 2 SCC 572 at p. 584: AIR 1979 SC 404 at p. 412. See also, *Authors' Lectures on Administrative Law* (2008) Lecture VII.

53. *S. Rama Iyer v. Sundaresa Ponnappoondar*, AIR 1966 SC 1431: (1966) 3 SCR 474; *Pandurang Mahadeo v. Annaji Balwant*, (1971) 3 SCC 530: AIR 1971 SC 2228; *Chaube Jagdish Prasad v. Ganga Prasad Chaturvedi*, AIR 1959 SC 492: 1959 Supp (1) SCR 733; *Ujjam Bai v. State of U.P.*, AIR 1962 SC 1621: (1963) 1 SCR 778; *Raja Anand Brahma v. State of U.P.*, AIR 1967 SC 1081: (1967) 1 SCR 373; *Shrisht Dhawan v. Shaw Bros.*, (1992) 1 SCC 534.

54. *Keshardeo Chamria v. Radha Kissen Chamria*, AIR 1953 SC 23; *Chaube Jagdish Prasad v. Ganga Prasad Chaturvedi*, AIR 1959 SC 492: 1959 Supp (1) SCR 733; *D.L.F. Housing and Construction Co. (P) Ltd. v. Sarup Singh*, (1969) 3 SCC 807: AIR 1971 SC 2324; *Kuldip Singh v. State of Punjab*, AIR 1956 SC 391 at p. 399: 1956 SCR 125.

55. *Narasinga Gowda v. Subramanya Saralava*, AIR 1972 Mys 346; *Avirah Ouseph v. Karthiyayanr Amma Ammukutty*, AIR 1965 Ker 179.

56. *Ibid*, *United Bank of India v. Ram Raj Goala*, (1980) 1 LLJ 290.

make;<sup>57</sup> or (v) grants an injunction without considering whether a *prima facie* case is made out;<sup>58</sup> or (vi) allows withdrawal of a suit on a ground not contemplated under Order 23 Rule 1;<sup>59</sup> or (vii) directs a subordinate court to try a suit not triable by it;<sup>60</sup> etc.

(e) Failure to exercise jurisdiction: Clause (b)

A revision also lies where a subordinate court has failed to exercise jurisdiction vested in it by law. A court having jurisdiction to decide a matter, thinks erroneously under a misapprehension of law or of fact that it has no such jurisdiction and declines to exercise it; the High Court can interfere in revision.<sup>61</sup>

The following cases have been held to be cases of failure to exercise jurisdiction by a subordinate court: (i) refusal by the court to summon the deponent of an affidavit for cross-examination;<sup>62</sup> or (ii) failure of the executing court to construe the decree;<sup>63</sup> (iii) failure on the part of the court in considering the principles for the grant of *ad interim* injunction and refusing to grant it;<sup>64</sup> or (iv) refusal to entertain or rejection of a plaint, application, memorandum of appeal or review application on the erroneous view that it has no jurisdiction to entertain;<sup>65</sup> or (v) rejection of a counterclaim on the ground that the original suit is dismissed for default;<sup>66</sup> or (vi) refusal to make a reference under Order 46 Rule 7;<sup>67</sup> or (vii) an erroneous interpretation of statutory provisions as obligatory instead of directory;<sup>68</sup> etc.

57. *Renuka Batra v. Grindlays Bank Ltd.*, AIR 1980 Punj 146; *Bai Moti Vela v. Bai Ladhi Vela*, AIR 1974 Guj 52; *Delhi Financial Corpn. v. Ram Pershad*, AIR 1973 Del 28.

58. *Bihar SEB v. Jawahar Lal*, AIR 1976 Pat 323; *Vellakutty v. Karthyayani*, AIR 1968 Ker 179.

59. *Ramrao Bhagwantrao v. Babu Appanna*, AIR 1940 Bom 121 (FB); *Paira Ram v. Ganesh Dass*, AIR 1967 Punj 237; *Jagdish Chander v. Karam Chand*, AIR 1968 Del 181.

60. *Nizakat Ali v. Shaukat Husain*, AIR 1943 All 300, *Vuppuluri Atchayya v. Kanchumarti Venkata*, AIR 1915 Mad 1223 (FB).

61. *Joy Chand v. Kamalaksha*, (1948-49) 76 IA 131; AIR 1949 PC 239; *Kasturi & Sons (P) Ltd v. N. Salivateswaran*, AIR 1958 SC 507; 1959 SCR 1; *Chaube Jagdish Prasad v. Ganga Prasad Chaturvedi*, AIR 1959 SC 492; 1959 Supp (1) SCR 733, *State of M.P. v. Azad Bharat Finance Co.*, AIR 1967 SC 276; 1966 Supp SCR 473.

62. *Sripathi Rajyalakshmi v. Sripathi Seetamahalakshmi*, AIR 1973 AP 203.

63. *Bhavan Vaja v. Solanki Hanuji Khodaji*, (1973) 2 SCC 40; AIR 1972 SC 1371.

64. *Chandrama Singh v. Yasodanandan Singh*, AIR 1972 Pat 128, *Sankara Pillai v. Inez Rosario*, AIR 1971 Ker 27.

65. *Kasturi & Sons (P) Ltd. v. N. Salivateswaran*, AIR 1958 SC 507; 1959 SCR 1; *Ram Nirnanjan Prasad v. Chhedilal Saraf*, AIR 1976 Pat 90, *Munikrishna Reddy v. S K Ramaswami*, AIR 1969 Mad 389, *Pratap Chandra Biswas v. Union of India*, AIR 1956 Ass 85, *Vasant Janwantrao v. Tukaram Mahadaji*, AIR 1960 Bom 485.

66. *Lingaraju Maharana v. Motilal Brothra*, (1973) 39 Cut LT 611.

67. *Cantonment Board v. Phulchand* AIR 1932 Nag 70.

68. *State of M. P. v. Azad Bharat Finance Co.*, AIR 1967 SC 276. 1966 Supp SCR 473.

(f) Exercise of jurisdiction illegally or with material irregularity: Clause (c)

Finally, a revision also lies where the subordinate court has acted in the exercise of its jurisdiction illegally or with material irregularity.

But then, what is meant by the expressions "illegally" and "material irregularity"? Though no precise definition or meaning can be given to these words, after referring to the leading cases<sup>69</sup>, the Supreme Court observed in the case of *Keshardeo v. Radha Kissen*<sup>70</sup>, "The errors contemplated relate to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes have been complied with."<sup>71</sup> They do not refer to the decision arrived at but the manner in which it is reached. In that case, the Supreme Court approved the following observations of the Privy Council in the leading case of *Rajah Amir Hassan Khan v. Sheo Baksh Singh*<sup>72</sup>:

"The question then is, did the judges of the lower courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the case, and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity." (emphasis supplied)

In *Malkarjun Bin Shidramappa v. Narhari Bin Shivappa*<sup>73</sup> also, the Privy Council observed, "It (the lower court) made a sad mistake it is true; but a court has jurisdiction to decide wrong as well as right."<sup>74</sup> In *D.L.F. Housing and Construction Co. (P) Ltd. v. Sarup Singh*<sup>75</sup>, the Supreme Court observed:

"The position thus seems to be firmly established that while exercising the jurisdiction under Section 115, it is not competent to the High Court to correct errors of fact however gross or even errors of law unless the said errors have relation to the jurisdiction of the court to try the dispute itself... The words 'illegally' and 'with material irregularity' as used in this clause [cl. (c)] do not cover either errors of fact or of law; they do not refer to the decision arrived at but merely to the manner in which it is reached. The errors contemplated by this clause may, in our view, relate either

69. *Rajah Amir Hassan v. Sheo Baksh Singh*, (1883-84) 11 IA 237; ILR (1885) 11 Cal 6 (PC); *Balakrishna Udayar v. Vasudeva Aiyar*, AIR (1916-17) 44 IA 261; AIR 1917 PC 71; *N.S. Venkatagiri Ayyangar v. Hindu Religious Endowments Board*, (1948-49) 76 IA 67; AIR 1949 PC 156; *Joy Chand v. Kamalaksha*, (1948-49) 76 IA 131; AIR 1949 PC 239; *Narayan Sonaji v. Sheshrao Vithoba*, AIR 1948 Nag 258.

70. AIR 1953 SC 23; 1953 SCR 136.

71. *Ibid*, at p. 28 (AIR). See also *Satyanarayan v. Mallikarjun Bhavanappa*, AIR 1960 SC 137 at p. 142; (1960) 1 SCR 890; *Chaube Jagdish Prasad v. Ganga Prasad Chaturvedi*, AIR 1959 SC 492 at pp. 497-98; 1959 Supp (1) SCR 733; *M.K. Palaniappa v. A. Pennuswami*, (1970) 2 SCC 290; *Ratilal v. Ranchhodhbhai*, AIR 1966 SC 439.

72. (1883-84) 11 IA 237; ILR (1885) 11 Cal 6 (PC).

73. (1899-1900) 27 IA 216; ILR (1901) 25 Bom 337 (PC), 568.

74. *Ibid*, at p. 225 (IA).

75. (1969) 3 SCC 807; AIR 1971 SC 2324.

*to breach of some provision of law or to material defects of procedure affecting the ultimate decision, and not to errors either of fact or of law, after the prescribed formalities have been complied with.*"<sup>76</sup> (emphasis supplied)

In the following cases, it has been held that the court had exercised its jurisdiction illegally or with material irregularity: (i) where it decides a case without considering the evidence on record;<sup>77</sup> or (ii) decides on evidence not legally taken or otherwise inadmissible;<sup>78</sup> or (iii) decides a case without recording reasons for its judgment;<sup>79</sup> or (iv) does not apply its mind to the facts and circumstances of the case;<sup>80</sup> or (v) fails to follow a decision of the High Court to which it is subordinate;<sup>81</sup> or (vi) follows a decision which does not apply to the facts of the case;<sup>82</sup> or (vii) decides a case in the absence of the party or without giving an opportunity of being heard to the party whose rights are adversely affected by such decision;<sup>83</sup> or (viii) in framing issues wrongly places burden of proof;<sup>84</sup> or (ix) orders the execution of a decree which is not executable;<sup>85</sup> or (x) orders attachment before judgment in absence of any material to support such order or without following the procedure under Order 38;<sup>86</sup> or (xi) grants or refuses to grant temporary injunction without considering and applying the provisions of Order 39;<sup>87</sup> or (xii) confirms an execution sale under Order 21 Rule 92 without disposing of an application to set aside the sale under Order 21 Rule 90;<sup>88</sup> or (xiii) passes a decree on the compromise by the guardian *ad litem* without enquiring whether it was for the benefit of the minor;<sup>89</sup> or (xiv) proceeds with the later suit ignoring the provisions of Section 10 of the Code;<sup>90</sup> or (xv) consolidates two suits for hearing without consent of parties even though the parties are not common and the issues are also different;<sup>91</sup> or (xvi) omits to draw

76. *Ibid*, at pp. 811-12 (SCC): at pp. 2327-28 (AIR).

77. *Shambhu Dayal v. Basdeo Sahai*, AIR 1970 All 525; *Kochrabhai v. Gopalbhai*, AIR 1973 Guj 29 (FB).

78. *Ramnath Singh v. Ram Bahadur*, AIR 1973 All 290.

79. *Ratna Devi v. Vidya Devi*, AIR 1977 NOC 146 (All).

80. *Ajantha Transports (P) Ltd. v. T.V.K. Transports.* (1975) 1 SCC 55; AIR 1975 SC 123; *Probodh Kumar v. Mohit Kumar*, AIR 1978 Cal 505.

81. *Rajeshwar Dayal v. Padam Kumar*, AIR 1970 Raj 77.

82. *Tila Mohammad v. Municipal Committee*, AIR 1941 Pesh 76.

83. *Hardeva v. Ismail*, AIR 1970 Raj 167; ILR 1970 Raj 20; 1970 Raj LW 316 (FB). *Vankar Kuber v. Vankar Lilaben*, (1979) 20 Guj LR 584; 1979 Hin LR 559, *Ratna Devi v. Vidya Devi* *supra*.

84. *Bihar SEB v. Jawahar Lal*, AIR 1976 Pat 323.

85. *Shah Mohd. Khan v. Hanwant Singh*, ILR (1898) 20 All 311.

86. *Vasu v. Narayanan*, AIR 1962 Ker 261. See also *supra*, Pt II, Chap 11.

87. *Ibid* see also *supra*, Pt II, Chap 11.

88. *Narendra Nath v. Birendra Nath*, AIR 1942 Cal 480.

89. *Hardeo Bakhsh Singh v. Bharath Singh*, AIR 1935 Oudh 287.

90. *Mugli v. Khaliq Dar*, AIR 1979 J&K 84.

91. *Minor Bhopo v. Mani*, AIR 1961 Guj 192 (1961) 2 Guj LR 179.

up a decree in accordance with the judgment;<sup>92</sup> or (xvii) orders for the appearance of a *pardanashin* lady in public;<sup>93</sup> or (xviii) erroneously shuts out the evidence of a party;<sup>94</sup> or (xix) does not consider condonation of delay under Section 5 of the Limitation Act, 1963;<sup>95</sup> or (xx) remands a case after framing issues which do not arise in the case;<sup>96</sup> or (xxi) admits additional evidence in appeal without considering the provisions of Order 41 Rule 27 of the Code;<sup>97</sup> or (xxii) acts in violation of Section 113 of the Code by holding an Act of Parliament to be *ultra vires*;<sup>98</sup> or (xxiii) accepts a plaint without court fees;<sup>99</sup> or (xxiv) makes an order ignoring an earlier order passed by the court;<sup>100</sup> or (xxv) grants a relief not prayed for by a party,<sup>101</sup> etc.

## 17. ALTERNATIVE REMEDY

Exercise of revisional jurisdiction is in the discretion of the court and no party can claim it "as of right". Before exercising revisional powers, the High Court may consider several circumstances and decide whether power under Section 115 of the Code should be exercised in favour of the applicant before the court. One of the factors which the court usually considers is availability of an alternative remedy to the aggrieved party. Where such aggrieved party has alternative and efficacious remedy, the court may not entertain a revision under Section 115 of the Code.<sup>102</sup>

## 18. OTHER LIMITATIONS OF REVISIONAL JURISDICTION

It should, however, be remembered that exercise of revisional jurisdiction by the High Court is discretionary and the High Court is not bound to interfere merely because the conditions laid down in clause

92. *Bahram v. Manohar*, AIR 1943 Nag 204; *Sidhnath v. Ganesh Govind*, ILR (1912) 37 Bom 60.
93. *Gyarsibai v Mangilal*, AIR 1958 MP 25.
94. *Conceicao Antonio Fernandes v. Dr Arfanode L.P. Furtado*, AIR 1975 Goa 27.
95. *Seva Samaj Sanchalak v. State of Kerala*, AIR 1972 Ker 184; *Bhaktipada Majhi v. SDO*, AIR 1971 Cal 204.
96. *Brijlal v. Tikhu*, AIR 1956 HP 37; *Hemsingh v. Motisingh*, AIR 1955 Raj 127.
97. *Seth Kunjilal v. Shankar Nanuram*, AIR 1943 Nag 289.
98. *Delhi Financial Corpn. v. Ram Pershad*, AIR 1973 Del 28.
99. *Chandappa v. Sadruddin Ansari*, AIR 1958 Mys 132.
100. *State of Bihar v. Bhagwati Singh*, AIR 1976 Pat 295.
101. *Saida Begam v. Sabir Ali*, AIR 1962 All 9.
102. *Major S.S. Khanna v. Brig F.J. Dillon*, AIR 1964 SC 497; (1964) 4 SCR 409; *Printers (Mysore) (P) Ltd. v. Pothan Joseph*, AIR 1960 SC 1156; *Mechelec Engineers & Manufacturers v. Basic Equipment Corpn.*, (1976) 4 SCC 687. AIR 1977 SC 577; *Municipal Corpn. of Delhi v. Suresh Chandra*, (1976) 4 SCC 719; AIR 1977 SC 2621.

(a), (b) or (c) of Section 115 are satisfied.<sup>103</sup> An applicant invoking the revisional jurisdiction of the High Court must, therefore, show not only that there is a jurisdictional error but also that the interests of justice call for interference.<sup>104</sup>

At the same time, however, it cannot be overlooked that the revisional powers under Section 115 are intended to be exercised with a view to subserve and not to defeat the ends of justice.<sup>105</sup> As a general rule, where substantial justice has been done by the order of the lower court, the High Court will not interfere with it in revision notwithstanding the fact that the reasons for the order are not correct or the order is improper or irregular.<sup>106</sup> On the other hand, where the order passed by a lower court results in grave injustice or hardship or substantial failure of justice, the High Court will interfere.<sup>107</sup> Again, the High Court will generally not interfere in favour of a party who has an alternative remedy available against the order passed by the lower court,<sup>108</sup> or who suppresses material facts from the court,<sup>109</sup> or who is not vigilant about his rights and where there is great and unexplained delay and laches on the part of the applicant.<sup>110</sup>

It is submitted that the following observations of Shah, J. (as he then was) in the case of *Major S.S. Khanna v. Brig. F.J. Dillon*<sup>111</sup> lay down the general principles regarding the ambit and scope of the revisional powers of the High Court under Section 115 of the Code and, therefore, require to be quoted:

"That is not to say that the High Court is obliged to exercise its jurisdiction when a case is decided by a subordinate court and the conditions in clause (a), (b) or (c) are satisfied. Exercise of jurisdiction is discretionary, the High Court is not bound to interfere merely because the conditions are satisfied. *The interlocutory character of the order, the existence of another remedy to an aggrieved party by way of an appeal from the ultimate order or decree in*

103. *Major S.S. Khanna v. Brig F J Dillon*, AIR 1964 SC 497 at p 501 (1964) 4 SCR 409 *Brig Gopal v. Kishan Gopal*, (1973) 1 SCC 635 at p. 638. AIR 1973 SC 1096 at pp 1097-98. *Ram Manprasad v. Gopichand*, (1973) 4 SCC 89 at pp. 93-94. AIR 1973 SC 566

104. *Ibid*, see also *Indian Agricultural Research Institute v. Vidya Sagar*, AIR 1973 HP 29. *Lonand Grampanchayat v. Ramgiri Gosavi*, AIR 1968 SC 222 at pp. 223-24. (1967) 3 SCR 774.

105. *Kedarnath Mattulal v Baboolal*, AIR 1976 MP 62; *DV Shindagi v Saraswatihai* AIR 1969 Mys 77, *Shah Jagmohandas v. Jamnadas*, AIR 1965 Guj 181 (1965) 6 Guj LR 49

106. *Ibid*.

107. *Food Corporation of India v. Birendra Nath*, AIR 1978 Cal 264, *Orugunati Ranganayakamma v Maduri Lakshminarasamma*, AIR 1979 AP 8

108. *Major S S Khanna v. Brig F J. Dillon*, AIR 1964 SC 497 at p 501 (1964) 4 SCR 409

109. *Jitendra Nath v Tarakchandra*, AIR 1947 Cal 28, *Weicem Hotel v State of A P.* (1983) 4 SCC 575 AIR 1983 SC 1015

110. *Sita Bai v Vidhyawati*, AIR 1972 MP 198, *Ram Narayan v Rajeshwari Devi*, AIR 1978 All 214, *T N Mahajan v Janta Steel & Metal Coop Industrial Society Ltd*, AIR 1976 Purn 324 *Jaichand Lal v Gopal Prasad*, AIR 1973 Pat 441

111. AIR 1964 SC 497 (1964) 4 SCR 409

*the proceeding or by a suit, and the general equities of the case being served by the order made are all matters to be taken into account in considering whether the High Court, even in cases where the conditions which attract the jurisdiction exist, should exercise its jurisdiction.*"<sup>112</sup> (emphasis supplied)

The proviso to sub-section (1) of Section 115, as amended by the Code of Civil Procedure (Amendment) Act, 1999 expressly states that the High Court shall not vary or reverse any order passed in the course of a suit or other proceedings except where the order, if it had been made in favour of the applicant, it would have finally disposed of the suit or other proceedings.<sup>113</sup>

Again, sub-section (2) now prohibits the High Court from interfering in revision if an appeal against the order or decree sought to be reversed lies to the High Court or to any court subordinate to the High Court.<sup>114</sup>

Sub-section (3) as inserted by the Amendment Act of 1999 clarifies that mere filing to revision in the High Court would not operate as stay of suit or other proceedings before the court where such suit or proceedings are pending unless such stay is granted by the High Court.

## 19. FORM OF REVISION

No particular form of revision is prescribed in the Code. Such petition, however, must contain grounds as to error of jurisdiction covered by Section 115 of the Code.<sup>115</sup>

## 20. LIMITATION

The period of limitation for preferring a revision application is ninety days from the decree or order sought to be revised.<sup>116</sup>

## 21. SUO MOTU EXERCISE OF POWER

Normally, a High Court will exercise revisional powers on the application of an aggrieved party, but in appropriate cases where the

112. *Major S.S. Khanna v. Brig. F.J. Dillon*, AIR 1964 SC 497 at p. 501 (*per* Shah, J.). See also *Brij Gopal v. Kishan Gopal*, (1973) 1 SCC 635 at p. 638; AIR 1973 SC 1096 at pp. 1099-98; *Rami Manprasad v. Gopichand*, (1973) 4 SCC 89 at p. 98; AIR 1973 SC 566; *Manick Chandra v. Debdas Nandy*, (1986) 1 SCC 512 at pp. 516-17; AIR 1986 SC 446.

113. Proviso to S. 115 (1); see also *Ram Narayan v. Rajeshwari Devi*, AIR 1978 All 214; *Food Corporation of India v. Birendra Nath*, AIR 1978 Cal 264; *Ram Narain v. Seth Sao*, AIR 1979 Pat 174.

114. *Khem Chand v. Hari Singh*, AIR 1979 Del 7.

115. For Model Revision, see, Appendix F.

116. Art. 131, Limitation Act, 1963.

conditions laid down in this section are satisfied, it may *suo motu* (of its own motion) call for any record and pass necessary orders. There is no bar on the power of the High Court in exercising revisional jurisdiction unless a prayer is made by a party. A person other than a party to a proceeding can also bring illegality or irregularity to the notice of the High Court.<sup>117</sup>

In *Swastik Oil Mills Ltd. v. CST*<sup>118</sup>, the Supreme Court stated, "Whenever a power is conferred on an authority to revise an order, the authority is entitled to examine the correctness, legality and propriety of the order and to pass such suitable orders as the authority may think fit in the circumstances of the particular case before it. When exercising such powers, there is no reason why the authority should not be entitled to hold an enquiry or direct an enquiry to be held and, for that purpose, admit additional material. The proceedings for revision, if started *suo motu*, must not, of course, be based on a mere conjecture and there should be some ground for invoking the revisional powers. Once those powers are invoked, the actual interference must be based on sufficient grounds, and, if it is considered necessary that some additional enquiry should be made to arrive at a proper and just decision, there can be no bar to the revising authority holding a further enquiry or directing such an enquiry to be held by some other appropriate authority."<sup>119</sup>

## 22. REVISION UNDER OTHER LAWS

Revisional jurisdiction under Section 115 CPC is limited to "errors of jurisdiction". In other statutes, however, revisional powers may not be confined or circumscribed to errors of jurisdiction only. Thus, where revisional powers can be exercised to decide "legality" or "propriety", or "correctness" of the decision, the jurisdiction is wider than the jurisdiction under Section 115 CPC. The scope of revisional jurisdiction thus depends upon the language of the statute conferring jurisdiction on the court.<sup>120</sup>

## 23. INTERLOCUTORY ORDERS

Interim or interlocutory orders fall into two classes:

117. *Swastik Oil Mills Ltd. v. CST*, *infra*, *Percy Wood v. Samuel*, AIR 1943 Nag 333; *Avirah Ouseph v. Karthiyayanr Amma Ammukuttu*, AIR 1965 Ker 179; *Katragada China v. Chiruvella Venkanraju*, AIR 1954 Mad 864 (FB); *Sarat Chandra v. Narasingha Patra*, AIR 1988 Ori 4; *State of Kerala v. N. Avinasiappan*, (2004) 1 SCC 344.
118. AIR 1968 SC 843; (1968) 2 SCR 492.
119. *Ibid.* at pp. 845-46 (AIR).
120. *Rajbir Kaur v. S. Chokesiri and Co.* (1989) 1 SCC 19; AIR 1988 SC 1845. For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol II at pp. 685-86.

- (i) Interlocutory orders which are appealable; and
- (ii) Interlocutory orders which are non-appealable.

The orders falling under the former class are appealable under Section 104 and, hence, no revision lies, whereas the orders falling under the latter class are subject to revision under Section 115, if the conditions laid down in the section are fulfilled.<sup>121</sup>

## 24. DEATH OF APPLICANT

The provisions of Order 22 do not apply to revision applications. A revision, therefore, does not abate on the death of the applicant or on account of failure on the part of the applicant to bring on record the heirs of the deceased opponent.<sup>122</sup>

## 25. DOCTRINE OF MERGER

Revisional jurisdiction is a part of appellate jurisdiction of the High Court. Revision is but one of the modes of exercising powers conferred by a statute. Basically and fundamentally, it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense. Hence, when the aid of the High Court is invoked on the revisional side, it is because it is a superior court. The doctrine of merger, therefore, applies to orders passed in revision and the order passed by a subordinate court gets merged in the order passed by the High Court.<sup>123</sup>

## 26. PROCEDURE

No specific or express procedure is prescribed in the Code which is required to be followed in revision. Grounds of revision can be couched as in an appeal. They should, however, contain objections as to jurisdiction.<sup>124</sup> Ordinarily a certified copy of the order impugned should be filed in the revision.<sup>125</sup> No cross-objections can be filed in revision.<sup>126</sup> But

121. *Khushro S. Gandhi v. N.A. Guzder*, (1969) 1 SCC 358: AIR 1970 SC 1468.

122. *Nathooram v. Karbansilal*, AIR 1983 AP 278; *Totonio v. Maria*, AIR 1975 Goa 2; *Mohd. Sadaat Ali v. Corpn. of City of Lahore*, AIR 1949 Lah 186 (FB); *S.M.A. Samad v. Shahid Hussain*, AIR 1963 Pat 375.

123. *Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat*, (1969) 2 SCC 74: AIR 1970 SC 1; *S.K. Saldi v. U P. State Sugar Corpn. Ltd.*, (1997) 9 SCC 661: AIR 1997 SC 2182; *State of Madras v. Madurai Mills Co. Ltd.*, AIR 1967 SC 681: (1967) 1 SCR 732; *S. Shanmugavel Nadar v. State of T.N.*, (2002) 8 SCC 361: AIR 2002 SC 3484.

124. S. 115(1)(a), (b), (c); see also *Rawalpindi Theatres (P) Ltd. v. Patanjali*, AIR 1967 Punj 241.

125. *Mahesh Chander v. Darshan Kaur*, AIR 1982 NOC 69 (Delhi); *Shafiq Ahmad v. Shah Jehan Begum*, AIR 1981 Del 202.

126. *Venkatarama v. Ramaswami*, AIR 1952 Mad 504: (1951) 2 MLJ 32.

if the High Court feels that a particular finding recorded by the subordinate court is uncalled for, it can interfere *suo motu*.<sup>127</sup> Once a revision is admitted, it ought to have been decided on merits.<sup>128</sup> It should not be dismissed on the ground that it ought not to have been admitted.<sup>129</sup> If the High Court holds that revision is not maintainable or is barred by limitation, it should not make any observations on merits.<sup>130</sup>

## 27. DISMISSAL IN LIMINE

Where several contentions have been raised by the applicant, *normally*, a High Court should not dismiss the revision *in limine* (summarily) by one word ("Dismissed"). It should record reasons in brief.<sup>131</sup>

## 28. RECORDING OF REASONS

Where the parties are present before the High Court and specific pleas as to error of jurisdiction has been raised, the High Court should not dismiss the revision summarily without recording reasons.<sup>132</sup>

There is another reason also as to why the High Court should pass speaking order. Absence of reasons deprives the Supreme Court from knowing the reasons and circumstances which weighed with the High Court in dismissing the revision *in limine*. The necessity to give reasons, however brief, in support of its conclusion is too obvious to be emphasised. Obligation to record reasons introduces clarity and excludes, or at any rate minimizes, the chances of arbitrariness and enables the higher forum to test correctness and relevance of those reasons. If no reasons are recorded, the order is liable to be set aside.<sup>133</sup>

127. *Jia Lal v. Mohan Lal*, AIR 1960 J&K 22; *Pattammal v. Krishnaswami Iyer*, AIR 1928 Mad 794.

128. *Hukumchand Amolikchand Lodge v. Madhava Balaji*, 1984 Supp SCC 600; AIR 1983 SC 540.

129. *Ibid*, see also *Mohd. Ibrahim v. State Transport Appellate Tribunal*, (1971) 1 MLJ 76, *National Fertilizers Ltd v Municipal Committee, Bhatinda*, AIR 1982 Punj 432; *J P Ojha v. R R. Tandan*, AIR 1962 All 485.

130. *Narendra Babu v. Vidya Sagar*, AIR 1965 SC 338 AIR 1978 All 415.

131. *Harbans Sharma v. Pritam Kaur*, (1982) 3 SCC 386 (2), *Fauja Singh v Jaspal Kaur*, (1996) 4 SCC 461; *Dev Pal Kashyap v Ranjit Singh*, (2000) 9 SCC 420; *Kaushalya Devi v Mohinder Lal*, (2000) 9 SCC 417; see also *infra*, 'Recording of reasons'

132. *Ibid*, see also *Fauja Singh v. Jaspal Kaur*, (1996) 4 SCC 461, *Dev Pal Kashyap v. Ranjit Singh*, (2000) 9 SCC 420.

133. *Ibid*, see also *Harbans Sharma v Pritam Kaur*, (1982) 3 SCC 386 (2) For detailed discussion and case law, see, *Authors' Lectures on Administrative Law* (2012) Lecture VI, see also, V G Ramachandran, *Law of Writs* (2006) Vol. I, Pt. II, Chap. 6.

## 29. LETTERS PATENT APPEAL

No letters patent appeal lies from an order made in the exercise of revisional jurisdiction.<sup>134</sup>

## 30. SUPREME COURT

Normally, the Supreme Court will not interfere under Article 136 of the Constitutions with the order passed by the High Court in exercise of revisional jurisdiction.<sup>135</sup>

134. *J&K Coop. Bank v Shams-ud-din Bacha*, AIR 1970 J&K 190; *Munikrishna Reddy v. S.K. Ramaswami*, AIR 1969 Mad 389; *Sukhendu v. Hare Krishna*, AIR 1953 Cal 636.

135. For detailed discussion, see, V.G. Ramachandran, *Law of Writs* (2006) Vol. II, pp. 1440-541.



Part IV  
Execution

11

# CHAPTER 1

## Execution in General

### SYNOPSIS

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### 1. EXECUTION: MEANING

The term "execution" has not been defined in the Code. In its widest sense, the expression "execution" signifies the enforcement or giving effect to a judgment or order of a court of justice.<sup>1</sup> Stated simply, "execution" means the process for enforcing or giving effect to the judgment of the Court.<sup>2</sup> In other words, execution is the enforcement of decrees and orders by the process of the court, so as to enable the decree-holder to realise the fruits of the decree.<sup>3</sup> The execution is complete when the judgment-creditor or decree-holder gets money or other thing awarded to him by the judgment, decree or order.<sup>4</sup>

### 2. NATURE AND SCOPE

*A* files a suit against *B* for Rs 10,000 and obtains a decree against him. Here *A* is the judgment-creditor or decree-holder. *B* is the

1. *Halsbury's Laws of England* (4th Edn.) Vol. 17 at p. 232; *Concise Oxford English Dictionary* (2002) at p. 497; *Shorter Oxford Dictionary* (1990) Vol. 1 at p. 669, P.R. Aiyar, *Advanced Law Lexicon* (2005) Vol. II at pp. 1702-03; Justice C.K. Thakker, *Encyclopaedic Law Lexicon*, (2009) Vol. II, pp. 1744-46.
2. *Overseas Aviation Engineering, In re*, (1962) 3 All ER 12; 1963 Ch D 24 (*per* Lord Denning); *A.K. Ghose v R K Banerjee*, 79 CWN 76.
3. *Sreenath Roy v. Radhanath Mookerjee*, ILR (1882) 9 Cal 773 at p. 776; *A K Ghose v. R.K. Banerjee*, 79 CWN 76; *State of Rajasthan v. Rustamji Savkasha*, AIR 1972 Guj 179.
4. *Overseas Aviation Engg. (G.B.) Ltd., Re*, (1962) 3 WLR 594; 1963 Ch D 24; (1962) 3 All ER 12 (CA).

judgment-debtor, and the amount of Rs 10,000 is the judgment-debt or the decretal amount. Since the decree is passed against B, he is bound to pay Rs 10,000 to A. Suppose in spite of the decree, B refuses to pay the decretal amount to A, A can recover the said amount from B by *executing* the decree through judicial process. The principles governing execution of decrees and orders are dealt with in Sections 36 to 74 (substantive law) and Order 21 of the Code (procedural provisions). Order 21 contains 106 Rules and is the longest of all Orders in the Code.

### 3. EXECUTION PROCEEDINGS UNDER CPC

In *Ghan Shyam Das v. Anant Kumar Sinha*<sup>5</sup>, dealing with the provisions of the Code relating to execution of decrees and orders, the Supreme Court stated, "So far as the question of executability of a decree is concerned, the Civil Procedure Code contains elaborate and exhaustive provisions for dealing with it in all its aspects. The numerous rules of Order 21 of the Code take care of different situations providing effective remedies not only to judgment-debtors and decree-holders but also to claimant objectors, as the case may be. In an exceptional case, where provisions are rendered incapable of giving relief to an aggrieved party in adequate measure and appropriate time, the answer is a regular suit in the civil court. *The remedy under the Civil Procedure Code is of superior judicial quality than what is generally available under other statutes and the judge, being entrusted exclusively with administration of justice, is expected to do better.*"<sup>6</sup>

(emphasis supplied)

### 4. LAW COMMISSION'S VIEW

The Law Commission considered the difficulties realized by the decree-holders after obtaining decree from a competent court of law. It also went into the reasons for unsatisfactory state of affairs and made several recommendations and suggestions.<sup>7</sup>

5. (1991) 4 SCC 379 AIR 1991 SC 2251.

6. *Ibid.*, at p. 383 (SCC), at pp. 2253-54 (AIR). *Shaukat Hussain v. Bhuneshwari Devi*, (1972) 2 SCC 731. AIR 1973 SC 528. *Court of Wards v. Coomar Ramaput.* (1872) 14 MIA 605 17 WR 195 (PC); *Shyam Singh v. Collector, Distt. Hamirpur*, 1993 Supp (1) SCC 693. *Marshall Sons & Co (I) Ltd. v. Sahu Oretrans (P) Ltd.*, (1999) 2 SCC 325 AIR 1999 SC 882. *Kuer Jang Bahadur v. Bank of Upper India Ltd.*, AIR 1925 Oudh 448. *Vigneshwar v. Gangabai Kom Narayan*, AIR 1997 Kant 149. *Shub karan Bubna v. Sita Saran Bubna*, (2009) 9 SCC 689.

7. *Ibid.*, see also, Law Commission's Fourteenth Report (1958) at p. 431, Law Commission's Twenty-seventh Report (1964) at pp. 174-210, Law Commission's Fifty-fourth Report (1973) at pp. 72-92.

## 5. SCHEME OF EXECUTION: IMPORTANT HEADS

The subject of execution of decrees and orders may be discussed under the following heads:

- (1) Courts which may execute decrees
- (2) Application for execution
- (3) Stay of execution
- (4) Mode of execution
- (5) Arrest and detention
- (6) Attachment of property
- (7) Questions to be determined by executing court
- (8) Adjudication of claims
- (9) Sale of property
- (10) Delivery of possession, and
- (11) Distribution of assets.

## CHAPTER 2

# Courts Which May Execute Decrees

### SYNOPSIS

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## 1. GENERAL

Section 38 of the Code enacts that a decree may be executed either by the court which passed it or by the court to which it is sent for execution. Section 37 defines the expression "court which passed a decree" while Sections 39 to 45 provide for the transfer for execution of a decree by the court which passed the decree to another court, lay down conditions for such transfer and also deal with powers of executing court. All these sections, therefore, need to be read together.

## 2. COURT PASSING A DECREE: SECTION 37

Section 37 defines the expression "court which passed a decree". The section enlarges the scope of the expression "court which passed a decree" with the object of giving greater facilities to a decree-holder to realise the fruits of the decree passed in his favour.<sup>1</sup> The following courts fall within the said expression:

1. *Kasturi Rao v. Mehar Singh*, AIR 1959 Punj 350 at p 351, *Faiz Mohideen v. Sreevamulu*, (1997) 2 MLJ 78.

- (i) The court of first instance which actually passed the decree;
- (ii) The court of first instance in case of appellate decrees;
- (iii) Where the court of first instance has ceased to exist, the court which would have jurisdiction to try the suit at the time of execution; and
- (iv) Where the court of first instance has ceased to have jurisdiction to execute the decree, the court which at the time of execution would have had jurisdiction to try the suit.<sup>2</sup>

### 3. COURTS BY WHICH DECREES MAY BE EXECUTED: SECTION 38

A decree may be executed either by the court which passed it, or by the court to which it is sent for execution.<sup>3</sup> A court which has neither passed a decree, nor a decree is transferred for execution, cannot execute it.<sup>4</sup>

Where the court of first instance has ceased to exist or ceased to have jurisdiction to execute the decree, the decree can be executed by the court which at the time of making the execution application would have jurisdiction in the matter.<sup>5</sup>

Sometimes a peculiar situation arises. Suppose court A passed a decree, and thereafter a part of the area within the jurisdiction of court A is transferred to court B. In such a situation the following two questions arise:

- (a) whether court A continues to have jurisdiction to entertain an application for execution? and
- (b) whether court B (to which the area is transferred) can also entertain an application for execution without a formal transmission of the decree from court A to court B?

The first question must now be answered in the affirmative after the pronouncement of the Supreme Court in the case of *Merla Ramanna v. Nallaparaju*<sup>6</sup>, wherein the court held:

"[I]t is settled law that the court which actually passed the decree does not lose its jurisdiction to execute it, by reason of the subject-matter thereof being transferred subsequently to the jurisdiction of another court."<sup>7</sup>

But with regard to the second question, there were conflicting decisions. The High Court of Calcutta<sup>8</sup>, on the one hand, had taken the view

- 2. *Mahijibhai Mohanbhai v. Patel Manibhai*, AIR 1965 SC 1477 at pp. 1484-85; (1965) 2 SCR 436; *Ramankutty Guptan v. Avara*, (1994) 2 SCC 642.
- 3. S. 38.
- 4. *Ghantesher v. Madan Mohan*, (1996) 11 SCC 446; AIR 1997 SC 471.
- 5. *Merla Ramanna v. Nallaparaju*, AIR 1956 SC 87; (1955) 2 SCR 938.
- 6. *Ibid.* 7. *Ibid.* at p. 93 (AIR).
- 8. *Latchman Pundeh v. Maddan Mohun*, ILR (1881) 6 Cal 513; *Jahar v. Kamini Debi*, ILR (1901) 28 Cal 238; *Udit Narain v. Mathura Prasad*, ILR (1908) 35 Cal 974.

that in this situation both the courts (A and B) would be competent to entertain an application for execution; the High Court of Madras<sup>9</sup>, on the other hand, had taken a contrary view by holding that in the absence of an order of transfer by the court which passed the decree (court A), that court alone can entertain an application for execution and not the court to whose jurisdiction the subject-matter has been transferred (court B). The Supreme Court in *Merla Ramanna*<sup>10</sup> referred to the above conflict of decisions but left the point open and did not express any final opinion as to which of the two views is correct by observing thus, "It is not necessary in this case to decide which of these two views is correct"; because according to the Supreme Court even assuming that the opinion expressed in the *Madras case*<sup>11</sup> was correct since the transferee court had no inherent lack of jurisdiction, the objection to it ought to have been taken at the earliest opportunity and as it was not taken at that stage, it must be deemed to have been waived and cannot be raised at any later stage of the proceedings.<sup>12</sup> (emphasis supplied)

The Explanation added to Section 37 by the Amendment Act of 1976 gives effect to the Calcutta view and makes it clear that both the courts would be competent to entertain an application for execution of a decree.

#### 4. TRANSFER OF DECREE FOR EXECUTION: SECTIONS 39-42; ORDER 21 RULES 3-9

As stated above, a decree may be executed either by the court which passed it or by the court to which it is sent for execution. Section 39 provides for the transfer of a decree by the court which has passed it and lays down the conditions therefor.

As a general rule, the court which passed the decree is primarily the court to execute it, but such court may send the decree for execution to another court either *suo motu* (of its own motion)<sup>13</sup> or on the application of the decree-holder if any of the following grounds exists:<sup>14</sup>

- (i) The judgment-debtor actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such court; or

9. *Ramier v. Muthu Krishna Ayyar*, AIR 1932 Mad 418. ILR (1932) 55 Mad 801

10. AIR 1956 SC 87 (1955) 2 SCR 938.

11. *Ramier v. Muthu Krishna Ayyar*, AIR 1932 Mad 418. ILR (1932) 55 Mad 801.

12. *Merla Ramanna v. Nallaparaju*, AIR 1956 SC 87 at p. 93 (1955) 2 SCR 938

13. S. 39(2)

14. S. 39(1), see also *Firm Hansraj Nathuram v. Firm Lahu Raja & Sons* AIR 1963 SC 1180 (1963) 2 SCR 619; *Lahu Raja and Sons v. Hansraj Nathuram* (1971) 1 SCC 721 AIR 1971 SC 974, *Narhari Shivram v. Pannalal Umediram*, (1976) 3 SCC 203 AIR 1977 SC 164

- (ii) The judgment-debtor does not have property sufficient to satisfy the decree within the local limits of the jurisdiction of the court which passed the decree but has property within the local limits of the jurisdiction of such other court; or
- (iii) The decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of such other court; or
- (iv) The court which passed the decree considers it necessary for any other reason to be recorded in writing that the decree should be executed by such other court.

The provisions of Section 39 are, however, not mandatory<sup>15</sup> and the court has discretion in the matter which will be judicially exercised by it.<sup>16</sup> The decree-holder has no vested or substantive right to get the decree transferred to another court. The right of the decree-holder is to make an application for transfer which is merely a procedural right.<sup>17</sup> By the Amendment Act of 1976, sub-section (3) has been added to Section 39. It clarifies that the transferee court must have pecuniary jurisdiction to deal with the suit in which the decree was passed. Likewise, sub-section (4) of Section 39, as added by the Code of Civil Procedure (Amendment) Act, 2002 further clarifies that the court passing the decree has no power to execute such decree against a person or property outside the local limits of its territorial jurisdiction.

## 5. EXECUTION OF FOREIGN DECREES IN INDIA: SECTIONS 43-44-A

A combined reading of Sections 43, 44 and 44-A shows that Indian courts have power to execute the decrees passed by (1) Indian courts to which the provisions of the Code do not apply;<sup>18</sup> (2) the courts situate outside India which are established by the authority of the Central Government;<sup>19</sup> (3) revenue courts in India to which the provisions of the Code do not apply;<sup>20</sup> and (4) superior courts of any reciprocating territory.<sup>21</sup>

15. *Mahadeo Prasad Singh v. Ram Lochan*, (1980) 4 SCC 354 at pp. 360, 363: AIR 1981 SC 416.

16. *Manmatha Pal Choudhury v. Sarada Prosad Nath*, AIR 1939 Cal 651.

17. *Mahadeo Prasad Singh v. Ram Lochan*, (1980) 4 SCC 354 at pp. 360, 363: AIR 1981 SC 416.

18. S. 43; see also *Raj Rajendra Sardar Moloji Nar Singh v. Shankar Saran*, AIR 1962 SC 1737: (1963) 2 SCR 577.

19. *Ibid.*

20. S. 44.

21. S. 44-A.

## 6. EXECUTION OF INDIAN DECREES IN FOREIGN TERRITORY: SECTION 45

Section 45 deals with a converse case. It provides for the execution in foreign territory of the decrees passed by Indian courts in certain circumstances.<sup>22</sup>

## 7. EXECUTION OF DECREE AT MORE THAN ONE PLACE

The Code does not prevent a decree-holder from executing a decree simultaneously at more than one place against the property of the judgment-debtor.<sup>23</sup> Such power, however, should be exercised sparingly and in exceptional cases after issuing notice to the judgment-debtor.<sup>24</sup>

## 8. PROCEDURE IN EXECUTION

Where a decree is sent for execution to another court, the court which passed the decree shall send a decree to such court with (i) a copy of the decree; (ii) a certificate of non-satisfaction or part-satisfaction of the decree; and (iii) a copy of an order for the execution of the decree, or if no such order is passed, a certificate to that effect.<sup>25</sup> The court executing the decree, on receiving the copies of the decree and other certificates, shall cause the same to be filed without further proof.<sup>26</sup> Such court shall have the same powers in executing the decree as if it had been passed by itself.<sup>27</sup> Such court shall certify to the court which passed the decree the fact of such execution or the circumstances attending its failure to execute it.<sup>28</sup> Where the court to which the decree is sent for execution is a district court, it may be executed by itself or transferred by it to any subordinate court of competent jurisdiction.<sup>29</sup> Where such court is a High Court, the decree shall be executed as if it had been passed by that court (High Court) in the exercise of its original jurisdiction.<sup>30</sup> Where a decree is sent for execution in another State, it shall be executed by such court and in such manner as may be prescribed by rules in force in that State.<sup>31</sup> Where immovable property forms one estate or tenure and is situate within the territorial jurisdiction of two

22. See also *Kishendas v Indo-Carnatic Bank Ltd.*, AIR 1958 AP 407

23. *Prem Lata v. Lakshman Prasad*, (1970) 3 SCC 440 AIR 1970 SC 1525.

24. *Ibid*, see also *Lakshman Hari v V.G. Virkar*, AIR 1939 Bom 258

25. R 6

26. R 7

27. S. 42 See also *Jai Narain v Kedar Nath*, AIR 1956 SC 359 1956 SCR 62; *Mahadeo Prasad Singh v Ram Lochan*, (1980) 4 SCC 354 at pp 360, 363 AIR 1981 SC 416.

28. S 41.

29. R 8

30. R 9.

31. S 40

or more courts, any of such courts has jurisdiction to attach and sell the whole of such estate or tenure.<sup>32</sup>

## 9. POWERS OF TRANSFEROR COURT

Once a court which has passed a decree transfers it to another competent court, it would cease to have jurisdiction and cannot execute the decree.<sup>33</sup> It is only a transferee court to which an application for execution would lie. The limitation, however, is to the extent of the transfer and not in respect of other matters.<sup>34</sup>

## 10. POWERS OF TRANSFeree COURT

Once a decree is transferred for execution to another court, the transferee court shall have all powers to execute the decree as if it had been passed by the transferee court itself.<sup>35</sup> After the transfer of a decree, it is the transferee court which will decide all questions arising in execution proceedings.<sup>36</sup> Its jurisdiction remains till it certifies to the transferor court of the execution of the decree.<sup>37</sup>

## 11. POWERS OF EXECUTING COURT

Section 42 of the Code expressly confers upon the court executing a decree sent to it the same powers as if it had been passed by itself.<sup>38</sup> It is thus power and duty of the executing court to ensure that the defendant gives the plaintiff the very thing the decree directs and nothing more or nothing less.<sup>39</sup>

At the same time, the Code requires that the court executing the decree does not exercise power in respect of the matters which could be determined only by the court which passed the decree.<sup>40</sup> To put it differently, the powers to be exercised by the executing court relate to *procedure* to be followed in execution of a decree and do not extend to

32. R. 3; see also, R. 5.

33. *Maharajah of Bobbili v. Narasaraju Peda Srinthulu*, (1915-16) 43 IA 238 : AIR 1916 PC 16.

34. *Ibid*, see also *Merla Ramanna v. Nallaparaju*, AIR 1956 SC 87: (1955) 2 SCR 938; *S. Sundara Rao v. B. Appiah Naidu*, AIR 1954 Mys 1.

35. Ss. 41-42; see also *Merla Ramanna v. Nallaparaju*, AIR 1956 SC 87: (1955) 2 SCR 938; *Jonalagadda v. Shivaramakrishna*, AIR 1944 Mad 144.

36. *Ibid*, see also *Mahadeo Prasad Singh v. Ram Lochan*, (1980) 4 SCC 354 at pp. 360, 363: AIR 1981 SC 416.

37. *Ibid*, see also *Sital Prasad v. Clements Robson & Co.*, AIR 1921 All 199.

38. S. 41(1), (2), (3).

39. *Jai Narain v. Kedar Nath*, AIR 1956 SC 359 at p. 363: 1956 SCR 62 (per Bose, J.).

40. S. 42(4).

*substantive* rights of the parties. The executing court cannot convert itself into the court passing the decree.<sup>41</sup>

## 12. GENERAL PRINCIPLES

With regard to the powers and duties of executing courts, the following fundamental principles should be borne in mind:

- (1) *As a general rule, territorial jurisdiction is a condition precedent to a court executing a decree, and, therefore, no court can execute a decree in respect of property situate entirely outside its local jurisdiction.*<sup>42</sup>
- (2) An executing court cannot go behind the decree. It must take the decree as it stands and execute it according to its terms. It has no power to vary or modify the terms.<sup>43</sup> It has no power to question its legality or correctness.<sup>44</sup> This is based on the principle that a proceeding to enforce a judgment is *collateral* to the judgment and, therefore, no inquiry into its regularity or correctness can be permitted in such a proceeding.<sup>45</sup>
- (3) In case of inherent lack of jurisdiction, the decree passed by the court is a nullity and its invalidity could be set up wherever and whenever it is sought to be enforced, whether in execution or in collateral proceedings.<sup>46</sup> In such a case, there is no question of

41. *Jai Narain v. Kedar Nath*, AIR 1956 SC 359; see also *infra*, "General Principles"; *Shaukat Hussain v. Bhuneshwari Devi*, (1972) 2 SCC 731; AIR 1973 SC 528.

42. S. 39(4); see also *Premchand, Re*, ILR (1894) 21 Cal 832; *Bhagwati Prasad v. Jai Narain*, AIR 1958 All 425; *Tarachand v. Misrimal*, AIR 1970 Raj 53; *Ittyavira Mathai v. Varkey Varkey*, AIR 1964 SC 907 at p. 910; (1964) 1 SCR 495; *Delhi Cloth and General Mills Co. Ltd. v. Ramjidas*, AIR 1982 Cal 34; *Mohd. Naseem v. Chaman Ara*, (1998) 7 DLT 130. For detailed discussion about "Territorial Jurisdiction", see *supra*, Pt. II, Chap. 4.

43. *C.F. Angadi v. Y.S. Hirannayya*, (1972) 1 SCC 191; AIR 1972 SC 239; *State of Punjab v. Krishan Dayal Sharma*, AIR 1990 SC 2177; *Hiralal Moolchand v. Barot Raman Lal*, (1993) 2 SCC 458; AIR 1993 SC 1449; *V. Ramaswami v. Kailasa Thevar*, AIR 1951 SC 189; *State of M.P. v. Mangilal Sharma*, (1998) 2 SCC 510; AIR 1998 SC 743.

44. *V. Ramaswami Aiyengar v. Kailasa Thevar*, AIR 1951 SC 189 at p. 192; 1951 SCR 292; *Topanmal v. Kundomal*, AIR 1960 SC 388 at pp. 390-91; *Vasudev Dhanubhai Modi v. Rajabhai Abdul Rehman*, (1970) 1 SCC 670; AIR 1970 SC 1475; *Nagindas v. Dalpatram*, (1974) 1 SCC 242 at pp. 252-53; AIR 1974 SC 471 at p. 477; *Sunder Dass v. Ram Prakash*, (1977) 2 SCC 662 at p. 667; AIR 1977 SC 1201 at p. 1204; *SBI v. Indexport Registered*, (1992) 3 SCC 159 at p. 169; AIR 1992 SC 1740.

45. *Basant Singh v. Tirloki Nath*, AIR 1960 Punj 610; *Hira Lal v. Kali Nath*, (1962) 2 SCR 747; *Urban Improvement Trust v. Gokul Narain*, (1996) 4 SCC 178; AIR 1996 SC 1819; *Bhawarlal v. Universal Heavy Mechanical Lifting Enterprises*, (1999) 1 SCC 558.

46. *Kiran Singh v. Chaman Paswan*, AIR 1954 SC 340 at p. 342 (1955) 1 SCR 117; *Hira Lal v. Kali Nath*, AIR 1962 SC 199 at p. 201; *Bombay Gas Co. Ltd. v. Gopal Bhivra*, AIR 1964 SC 752 at p. 755 (1964) 3 SCR 709; *Kaushalya Devi v. K. L. Bansal*, (1969) 1 SCC 59 at pp. 60-61; AIR 1970 SC 838 at p. 839; *Sunder Dass v. Ram Prakash*, (1977) 2 SCC 662; *Mahadeo Prasad Singh v. Ram Lochan*, (1980) 4 SCC 354 at pp. 360, 363; AIR 1981 SC 416; *Hiralal Moolchand v. Barot Raman Lal*, AIR 1962 SC 199 at p. 201 (1993) 2 SCC 458.

going behind the decree, for really in the eye of the law there is no decree at all.<sup>47</sup>

- (4) Inherent lack of jurisdiction, however, must appear on the face of the record.<sup>48</sup> Hence, if the decree on the face of it discloses some material on the basis of which the court could have passed the decree, it would be valid. In such a case, the executing court must accept and execute the decree as it stands and cannot go behind it. To allow the executing court to go behind that limit would be to exalt it to the status of a superior court sitting in appeal over the decision of the court which has passed the decree.<sup>49</sup>
- (5) A decree which is otherwise valid and executable, does not become inexecutable on the death of the decree-holder or of the judgment-debtor and can be executed against his legal representatives.<sup>50</sup>
- (6) When the terms of a decree are vague or ambiguous, an executing court can construe the decree to ascertain its precise meaning.<sup>51</sup> For this purpose, the executing court may refer not only to the judgment, but also the pleadings of the case.<sup>52</sup>
- (7) An executing court can go into the question of the executability or otherwise of the decree and consider whether, by any subsequent developments, the decree has ceased to be executable according to its terms.<sup>53</sup>

*Chiranjilal v. Jasjit Singh*, (1993) 2 SCC 507; *Urban Improvement Trust v. Gokul Narain*, (1996) 4 SCC 178; *Jaipur Development Authority v. Radhey Shyam*, (1994) 4 SCC 370.

47. *Sunder Dass v. Ram Prakash*, (1977) 2 SCC 662; *Surinder Nath v. Union of India*, 1988 Supp SCC 626 at p. 634; AIR 1988 SC 1777; *S.P.A. Annamalai Chetty v. B.A. Thornhill*, AIR 1931 PC 263; (1931) 61 MLJ 420; 36 CWN 1; *Bhawarlal v. Universal Heavy Mechanical Lifting Enterprises*, (1999) 1 SCC 558.

48. *Hira Lal v. Kali Nath*, AIR 1962 SC 199; *Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman*, (1970) 1 SCC 670.

49. *Nagindas v. Dalpatram*, (1974) 1 SCC 242, at pp. 252-53 (SCC): at p. 477 (AIR); *K.K. Chari v. R.M. Seshadri*, (1973) 1 SCC 761. AIR 1973 SC 1311; *Sabitri Devi v. Sarat Chandra Rout*, (1996) 3 SCC 301.

50. *Parbati Devi v. Mahadeo Prasad*, (1979) 4 SCC 761; AIR 1979 SC 1915; *V. Uthirapathi v. Ashrab Ali*, (1998) 2 SCC 727. AIR 1998 SC 1168.

51. *V. Ramaswami v. Kailasa Thevar*, 1951 SCR 292; *Topanmal Chhotamal v. Kundomal Gangaram*, AIR 1960 SC 388 at p. 390; *Bhavan Vaja v. Solanki Hanuji Khodaji*, (1973) 2 SCC 40; *Surinder Nath v. Union of India*, 1988 Supp SCC 626.

52. *Bhavan Vaja v. Solanki Hanuji Khodaji*, (1973) 2 SCC 40; AIR 1972 SC 1371 at p. 1374; *Topanmal v. Kundomal*, AIR 1960 SC 388.

53. *Jai Narain v. Kedar Nath*, 1956 SCR 62; *Haji Sk. Subhan v. Madhorao*, AIR 1962 SC 1230 at p. 1235; 1962 Supp (1) SCR 123; *Sudhir Kumar v. Baldev Krishna*, (1969) 3 SCC 611. (1970) 3 SCR 114; *Vidya Sagar v. Sudesh Kumari*, (1976) 1 SCC 115; AIR 1975 SC 2295; *Bai Dosabai v. Mathurdas Govinddas*, (1980) 3 SCC 545 at pp. 552-54; AIR 1980 SC 1334 at pp. 1339-41; *Tiko v. Lachman*, 1995 Supp (4) SCC 582; *Maguni Charan v. State of Orissa*, (1976) 2 SCC 134; AIR 1976 SC 1121.

- (8) A decree which becomes inexecutable by operation of law, may become executable by virtue of a subsequent amendment in the statute and can be executed after such amendment.<sup>54</sup>
- (9) The executing court has power to mould the relief granted to the plaintiff in accordance with the changed circumstances.<sup>55</sup>
- (10) The court executing the decree transferred to it has the same powers in executing such decree as if it had been passed by itself.<sup>56</sup>

54. *Dularey Lodh v ADJ, Kanpur*, (1984) 3 SCC 99 at pp. 103, 106; AIR 1984 SC 1260; *Narhari Shivram v Pannalal Umediram*, (1976) 3 SCC 203 AIR 1977 SC 164.

55. *Yashpal Singh v. ADJ*, (1992) 2 SCC 504 at p. 506, *Haji Sk Subhan v Madhorao*, AIR 1962 SC 1230 at p. 1237 1962 Supp (1) SCR 123.

56. S 42 See also *Jai Narain v. Kedar Nath*, AIR 1956 SC 359, *Mahadeo Prasad Singh v Ram Lochan*, (1980) 4 SCC 354 at pp. 360, 363; AIR 1981 SC 416.

## CHAPTER 3

# Application for Execution

### SYNOPSIS

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### 1. GENERAL

Execution is the enforcement of a decree by a judicial process which enables the decree-holder to realise the fruits of the decree passed by a competent court in his favour. All proceedings in execution commence with the filing of an application for execution. Such application should be made to the court which passed the decree or, where the decree has been transferred to another court, to that court.<sup>1</sup> Rules 10-25 and 105-106 of Order 21 deal with execution applications.

### 2. WHO MAY APPLY?: RULE 10

The following persons may file an application for execution:

(i) Decree-holder.<sup>2</sup>

1. *Desh Bandhu Gupta v. N.L. Anand*, (1994) 1 SCC 131; *State of Rajasthan v. Rustamji Savkasha*, AIR 1972 Guj 179; *Ghulam Nabi v. Gaffer Wagey*, AIR 1983 J&K 67; 1982 Kash LJ 423.
2. R. 10.

- (ii) Legal representative of the decree-holder, if the decree-holder is dead.<sup>3</sup>
- (iii) Representative of the decree-holder.<sup>4</sup>
- (iv) Any person claiming under the decree-holder.<sup>5</sup>
- (v) Transferee of the decree-holder, if the following conditions are satisfied<sup>6</sup>:
  - (a) the decree must have been transferred by an assignment in writing or by operation of law;
  - (b) the application for execution must have been made to the court which passed the decree;
  - (c) notice and opportunity of hearing must have been given to the transferor and the judgment-debtor in case of assignment by transfer.

The provision of giving a notice is mandatory and in the absence of it, all the proceedings in the execution would be void.<sup>7</sup> The object of issuing a notice is to determine once and for all and in the presence of the parties concerned the validity or otherwise of the assignment or transfer.<sup>8</sup>

- (vi) One or more of the joint decree-holders, provided the following conditions are fulfilled:<sup>9</sup>
  - (a) the decree should not have imposed any condition to the contrary;
  - (b) the application must have been made for the execution of the whole decree; and
  - (c) the application must have been for the benefit of all the joint decree-holders;
- (vii) Any person having special interest.

In the case of a decree in a representative suit, a person represented in such suit may apply for execution, even if he is not on record.<sup>10</sup> A real beneficiary may also maintain an execution application.<sup>11</sup> In a partition suit, the defendant is also a decree-holder to the extent of his share

3. S. 146, see also *Ram Murti Devi v. Ralla Ram*, AIR 1987 HP 1; *Jagdish Dutt v. Dharam Pal*, (1999) 3 SCC 644; AIR 1999 SC 1694; *Jugaikishore v. Raw Cotton Co. Ltd.*, AIR 1955 SC 376; 1955 SCR 1369.

4. S. 146; see also *ibid.*

5. S. 146, see also *Ram Murti Devi v. Ralla Ram*, AIR 1987 HP 1 (*ibid.*)

6. S. 49, O. 21 R. 16; see also *Dhani Ram v. Lala Sri Ram*, (1980) 2 SCC 162; AIR 1980 SC 157; *Padmanabhan Pillai v. Sulaiman Kunju*, AIR 1987 Ker 125.

7. See *infra*, "Notice against execution".

8. *Brayabashi v. Manik Chandra*, AIR 1927 Cal 694; *Ramapal v. Thrinethran*, 1954 KLT 434 R 15.

10. *Swaminatha v. Kumarswami*, AIR 1923 Mad 472; *Ghulam Nabi v. Gaffer Wagay*, AIR 1983 J&K 67; 1982 Kash I J 423.

11. *Babu Satyendra Narain v. Wahiduddin Khan*, AIR 1940 Pat 472.

and can file an application for execution.<sup>12</sup> A receiver appointed by a court may apply for execution on behalf of the decree-holder.<sup>13</sup> An insolvent may make such an application before he is adjudicated an insolvent.<sup>14</sup> An agent of the decree-holder can maintain an application for execution.<sup>15</sup>

### 3. WHO CANNOT APPLY?

A person who is neither a decree-holder nor has a right to execute a decree cannot apply for execution of decree.<sup>16</sup> Similarly, a third party or a stranger has no right to apply for execution even if he is a beneficiary under a compromise.<sup>17</sup> In absence of transfer of interest by a trustee in favour of beneficiary, the latter cannot invoke Section 146 of the Code.<sup>18</sup> A receiver appointed by a court may file execution application. But if he is dead, his son cannot continue the proceedings.<sup>19</sup>

### 4. AGAINST WHOM EXECUTION MAY BE TAKEN OUT?

Execution may be taken out against the following persons:

- (i) Judgment-debtor.<sup>20</sup>
- (ii) Legal representatives of the judgment-debtor, if the judgment-debtor is dead.<sup>21</sup> (They shall, however, be liable to the extent of the property of the deceased judgment-debtor which has come to their hands.)<sup>22</sup>

execution.<sup>25</sup> Where territorial jurisdiction of a court is transferred after passing a decree, an execution application may be filed either in the court which had passed the decree, or in the court to which territorial jurisdiction was transferred.<sup>26</sup>

## 6. CONTENTS OF APPLICATION: RULE 11

Except in the case of a money decree, every application for execution shall be in writing, signed and verified by the applicant or by some other person acquainted with the facts of the case. It shall contain the necessary particulars like the number of the suit, the names of the parties, the date of the decree, the amount of the decree, etc.<sup>27</sup>

Where an application is made for attachment of movable property belonging to a judgment-debtor but not in his possession, the application for execution must be accompanied by an inventory of the property to be attached, containing a reasonably accurate description of the same.<sup>28</sup> Where the application is for the attachment of growing crop it shall specify the time at which it is likely to be harvested.<sup>29</sup>

Where the application is for attachment of immovable property of the judgment-debtor, it shall contain (a) the description of such property sufficient to identify the same; and (b) the specification of the judgment-debtor's share or interest therein.<sup>30</sup>

Where the application is for arrest and detention in prison of the judgment-debtor, it shall state or be accompanied by an affidavit stating the grounds on which arrest is sought.<sup>31</sup>

Where the application is for the attachment of land, registered in the office of the Collector, the court may require the applicant to produce a certified extract from such register.<sup>32</sup>

## 7. FORM

An application for execution shall be in Form No. 6 of Appendix E to the First Schedule. But even if an application is not in proper form, the defect is not vital or material.<sup>33</sup>

25. Ss 37, 38; see also *Desh Bandhu Gupta v. N.L. Anand*, (1994) 1 SCC 131

26. *Ibid*, see also, *Merla Ramanna v. Nallaparaju*, AIR 1956 SC 87 (1955) 2 SCR 938.

27. R 11

28. R 12

29. R 45(1).

30. R. 13

31. R 11-A.

32. R 14

33. *Ashalata Debi v. Jadu Nath Roy*, AIR 1954 SC 409 (1955) 1 SCR 150; *Jugalkishore v. Raw Cotton Co Ltd.*, AIR 1955 SC 376; 1955 SCR 1369; *Mohanlal Goenka v. Benoy Krishna*, AIR 1953 SC 65; 1953 SCR 377; *Jivani v. Rajmata Basantika Devi*, 1993 Supp (3) SCC 217; AIR 1994 SC 1286

## 8. PROCEDURE ON RECEIVING APPLICATION

### (a) Admission: Rule 17

Rule 17 prescribes the procedure to be followed on receiving an application for execution of a decree. It casts a duty upon the court to ascertain whether the execution application complies with the requirements of Rules 11 to 14. If they are complied with, the court must admit and register the application. If they are not complied with, the court shall allow the defect to be remedied then and there or within a time fixed by it. If the defect is not remedied within that period, the court shall reject the application. The provisions of this rule are procedural and they should be interpreted liberally.<sup>34</sup>

### (b) Hearing of application: Rules 105-106

Rules 105 and 106 have been inserted by the Amendment Act of 1976. Rule 105 provides that the court before which an application is pending may fix a date for hearing of such application. When the application is called out for hearing and the applicant is not present, the court may dismiss the application. On the other hand, if the applicant is present and the opposite party is not present, the court may hear the application *ex parte* and pass such order as it thinks fit.

Rule 106 lays down that if the application is dismissed for default or an *ex parte* order is passed under Rule 105, then the aggrieved party may apply to the court to set aside such order. The court shall set aside such order if sufficient cause is shown.

An order rejecting an application under Rule 106(1) is appealable.<sup>35</sup>

### (c) Notice of execution: Rule 22

Rule 22 provides for the issue of show-cause notices to persons against whom execution is applied for in certain cases. As a general rule, the law does not require any notice to be issued for execution.

In the following cases, however, such notice must be issued:

- (i) Where an application is made two years after the date of the decree; (or more than two years after the date of the last order made on any previous application for execution) or
- (ii) Where an application is made against the legal representative of the judgment-debtor; or

34. *Jiwani v. Rajmata Basantika Devi*, 1993 Supp (3) SCC 217; AIR 1994 SC 1286; *Jugalkishore v. Raw Cotton Co. Ltd.*, AIR 1955 SC 376; 1955 SCR 1369; *Mohanlal Goenka v. Benoy Krishna*, AIR 1953 SC 65; 1953 SCR 377.

35. Or. 43 R. 1(ja); see also *V.A. Narayana v. O.R.M.M.S.V.M. Meyyappa*, AIR 1975 Mad 36.

- (iii) Where an application is made for the execution of a decree passed by a court of reciprocating territory;<sup>36</sup> or
- (iv) Where an application is made against the assignee or receiver of insolvent judgment-debtor; or
- (v) Where the decree is for payment of money and the execution is sought for arrest and detention of judgment-debtor;<sup>37</sup> or
- (vi) Where an application is made against a surety;<sup>38</sup> or
- (vii) Where an application is made by the transferee or assignee of the decree-holder.<sup>39</sup>

The underlying object of giving notice to the judgment-debtor is not only to afford him an opportunity to put forward objections, if any, against the maintainability of the execution application but also to prevent his being taken by surprise and to enable him to satisfy the decree before execution is issued against him.<sup>40</sup>

The provision is not *ultra vires* Article 14 of the Constitution.<sup>41</sup> Issue of a notice under Rule 22 is intended to safeguard the interest of the judgment-debtor. It is a fundamental part of the procedure touching upon the jurisdiction of the executing court to take further steps in execution. It is, therefore, mandatory and is a condition precedent to the validity of execution proceedings.<sup>42</sup>

Omission to give notice is a defect which goes to the root of the proceedings and renders them null and void and without jurisdiction unless the judgment-debtor waives such notice.<sup>43</sup>

Sub-rule (2) of Rule 22, however, empowers the court to dispense with such notice, if it would cause unreasonable delay or would defeat

36. S. 44-A; see also *Jharkhand Mines & Industries Ltd. v. Nand Kishore Prasad*, AIR 1969 Pat 228.

37. Or. 21 R. 37.

38. S. 145; see also *Amar Chand v. Bhano*, 1995 Supp (1) SCC 550; AIR 1995 SC 871.

39. Or. 24 R. 16.

40. *Erava v. Sidramappa Pasare*, (1897) 21 Bom 424 (FB); *Lall v. Rajkishore*, AIR 1933 Pat 658, *Ramsaran Sah v. Deonandan Singh*, AIR 1957 Pat 433, *A. K. Narayanan Nambiar v. State of Kerala*, AIR 1964 Ker 158, *Satyanarain Bajoria v. Ramnarain Tibrewal*, (1993) 4 SCC 414, AIR 1994 SC 1583, *Desh Bandhu Gupta v. N. L. Anand*, (1994) 1 SCC 131.

41. *Thota Pichayya v. Govt. of A.P.*, AIR 1957 AP 136; 1956 AnWR 322.

42. *Raghunath Das v. Sundar Das*, (1913-14) 41 IA 251; AIR 1914 PC 129, *Chandra Nath v. Nabadiwip Chandra*, AIR 1931 Cal 476, *Odhavji v. Sakarchand*, AIR 1949 Bom 63 (FB), *Bandu Hari v. Bhagya Laxman*, AIR 1954 Bom 114; *Fakhrul Islam v. Bhuvaneshwari Kuer*, AIR 1929 Pat 79, *Ajab Lal Dubey v. Hari Charan Tiwari*, AIR 1945 Pat 1 (FB), *Satyanarain Bajoria v. Ramnarain Tibrewal*, (1993) 4 SCC 414 at p 420, *Desh Bandhu Gupta v. N. L. Anand*, (1994) 1 SCC 131.

43. *Raghunath Das v. Sundar Das Khetri*, AIR 1914 PC 129, *A. K. Narayanan Nambiar v. State of Kerala*, AIR 1964 Ker 158; *Bandu Hari v. Bhagya Laxman*, AIR 1954 Bom 114, *Rajagopala Aiyar v. Ramanujachariyar*, AIR 1924 Mad 431 (FB), *Desh Bandhu Gupta v. N. L. Anand*, (1994) 1 SCC 131 at pp 144-45.

the ends of justice.<sup>44</sup> But where a notice is dispensed with, the reasons for such dispensation should be recorded.<sup>45</sup>

There is, however, conflict of opinion as to the effect of omission to record reasons by the court. According to some High Courts, it is a mere irregularity and does not invalidate the proceedings.<sup>46</sup> While, according to some other High Courts, it is a defect which goes to the very root of the matter and renders all the proceedings void for want of jurisdiction.<sup>47</sup>

#### (d) Procedure after notice: Rule 23

If the person to whom the notice is issued under Rule 22 does not appear or does not show cause against execution, the court shall, unless it sees any cause to the contrary, issue process for the execution of the decree.<sup>48</sup> But where such person offers his objections against the execution of the decree, the court shall consider them and pass such order as it thinks fit.<sup>49</sup>

### 9. LIMITATION

The period of limitation for the execution of a decree (other than a decree granting a mandatory injunction) is twelve years from the date of the decree.<sup>50</sup> The period of limitation for the execution of a decree for mandatory injunction is three years from the date of the decree.<sup>51</sup>

### 10. EXECUTION APPLICATION AND RES JUDICATA

As stated above,<sup>52</sup> even before the Amendment Act of 1976, the doctrine of *res judicata* was judicially held applicable to execution proceedings.

44. *Raghunath Das v. Sundar Das Khetri*, AIR 1914 PC 129; *Jharkhand Mines & Industries Ltd. v. Nand Kishore Prasad*, AIR 1969 Pat 228; *Rajagopala Aiyar v. Ramanujachariyar*, AIR 1924 Mad 431; *A.K. Narayanan Nambiar v. State of Kerala*, AIR 1964 Ker 158.

45. *Satyanarain Bajoria v. Ramnarain Tibrewal*, (1993) 4 SCC 414; AIR 1994 SC 1583; *Desh Bandhu Gupta v. N.L. Anand*, (1994) 1 SCC 131; *Raghunath Das v. Sundar Das*, (1913-14) 41 IA 251; AIR 1914 PC 129; *Jharkhand Mines & Industries Ltd. v. Nand Kishore Prasad*, AIR 1968 Pat 668; *P.R. Srinivasa v. M.D. Narayana*, AIR 1918 Mad 645.

46. *Yakub Harunkhan v. Mahadev Narayan*, AIR 1932 Bom 509; *Manindra Chandra v. Rahatannessa Bibi*, AIR 1931 Cal 555; *Kamala Dutta v. Ballygunge Estates (P) Ltd.*, AIR 1974 Cal 75; 77 CWN 839; *Rajagopala Aiyar v. Ramanujachariyar*, AIR 1924 Mad 431 (FB); *Chacko Pylil v. Iype Varghese*, AIR 1956 TC 147; ILR 1955 TC 823; 1955 KLT 739 (FB).

47. *U Nyo v. U Po Thit*, AIR 1935 Rang 42; *Mansaram v. Kamarali*, AIR 1954 Nag 78.

48. Rr. 23(1), 24, 25, *Desh Bandhu Gupta v. N.L. Anand*, (1994) 1 SCC 131.

49. R. 23(2).

50. Art 136, Limitation Act, 1963.

51. Art. 133, Limitation Act, 1963.

52. *Supra*, Pt. II, Chap 2.

*Explanation VII* to Section 11 as added by the Amendment Act of 1976 now specifically provides that the provisions of *res judicata* will apply to execution proceedings also.

But before an earlier decision can operate as *res judicata*, the execution application must have been heard and finally decided by the Court on merits.<sup>53</sup> Hence, if an execution application is dismissed for default of appearance,<sup>54</sup> or for non-prosecution,<sup>55</sup> or as being premature,<sup>56</sup> or as being belated,<sup>57</sup> or on the ground that it is not pressed,<sup>58</sup> or is not maintainable,<sup>59</sup> the order will not operate as *res judicata* and a fresh execution application on the same ground for the same prayer is not barred.

53. *Pulavarthi Venkata v. Valluri Jagannadha*, AIR 1967 SC 591; (1964) 2 SCR 310; *Shivashankar Prasad v. Baikunth Nath*, (1969) 1 SCC 718. AIR 1969 SC 971.
54. *Shivashankar Prasad v. Baikunth Nath* (*ibid*).
55. *Ibid*, see also *Jagadeo Nawasji v. Coop. Society Mahalungi No. 2*, AIR 1951 Nag 210.
56. *Brij Behari Lal v. Phunni Lal*, AIR 1938 Ali 377; *Taluqdar Khan v. Khairulnisa*, AIR 1928 Oudh 38.
57. *G B. Solano v. Kumari Umeshwari*, AIR 1938 Pat 216.
58. *Firm Lachiram Santhokchand Ameechand v. Firm Tarachand Jayaruppi*, AIR 1937 Mad 289.
59. *Ameena Amma v. Sundaram Pillai*, (1994) 1 SCC 743; see also *supra*, Pt. II, Chap. 2.

## CHAPTER 4

# Stay of Execution

### SYNOPSIS

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### 1. WHEN COURT MAY STAY EXECUTION?: RULE 26

Provisions for stay of execution of a decree are made in Rule 26 of Order 21. This rule lays down that the executing court shall, on sufficient cause being shown and on the judgment-debtor furnishing security or fulfilling such conditions, as may be imposed on him, stay execution of a decree for a reasonable time to enable the judgment-debtor to apply to the court which has passed the decree or to the appellate court for an order to stay execution.

The power to stay execution of a decree by a transferee court is not similar to the power of the court which passes a decree. Whereas the transferor court can grant absolute stay, the transferee court can stay execution for a reasonable time to enable the judgment-debtor to apply to the transferor court or to the appellate court to grant stay against the execution. Such order can be made on the application of the judgment-debtor. A transferee court cannot invoke inherent powers to grant stay.<sup>1</sup>

Where the judgment-debtor applies for stay of execution, the transferee court must obtain security from the judgment-debtor or impose such conditions as it may think fit. The provision is thus mandatory and imperative.<sup>2</sup>

1. *Shaukat Hussain v. Bhuneshwari Devi*, (1972) 2 SCC 731: AIR 1973 SC 528.  
2. Or. 21 R. 26(3); see also *Gurinder Singh v. Harmala Kaur*, (1982) 2 SCC 54.

The transferee court is bound by an order made by the court which passed the decree or by an appellate court in relation to execution of such decree.<sup>3</sup>

## 2. STAYING OF ORDER AND QUASHING OF ORDER: DISTINCTION

There is distinction between staying of an order and quashing of an order. Quashing of an order means that no such order had ever been passed and there is restoration of position as it stood prior to the passing of the order. Stay of order, however, means that the order is very much there, but its operation is stayed.<sup>4</sup>

## 3. REVIVAL OF EXECUTION PROCEEDINGS: RULE 27

An order of restitution of property or the discharge of the judgment-debtor made under Rule 26 shall not prevent the court from restarting the execution proceedings.<sup>5</sup>

## 4. STAY OF EXECUTION PENDING SUIT: RULE 29

Rule 29 provides for stay of execution pending suit between the decree-holder and the judgment-debtor. It enacts that where a suit by the judgment-debtor is pending in a court against the decree-holder such court may, on the judgment-debtor furnishing security or otherwise as it thinks fit, stay execution of the decree until the disposal of such suit.

The underlying object of this provision is twofold, namely, (i) *firstly*, to enable the judgment-debtor and the decree-holder to adjust their claims against each other; and (ii) *secondly*, to prevent multiplicity of execution proceedings.<sup>6</sup>

For this rule to apply, there must be two simultaneous proceedings in one and the same court: (1) A proceeding in execution of the decree at the instance of the decree-holder against the judgment-debtor; and (2) a suit at the instance of the judgment-debtor against the decree-holder.<sup>7</sup>

3. R 28, see also *Shaukat Hussain v Bhuneshwari Devi*, (1972) 2 SCC 731. AIR 1973 SC 528, *Gurinder Singh v. Harmala Kaur*, (1982) 2 SCC 54

4. *Shree Chamundi Mopeds Ltd. v Church of South India Trust Assn.*, (1992) 3 SCC 1 AIR 1992 SC 1439.

5. R 27, see also *Shaukat Hussain v. Bhuneshwari Devi*, (1972) 2 SCC 731

6. *Mahesh Chandra v. Jogendra Lal*, AIR 1928 Cal 222, *Rangaswami Battar v Alasinga Battar*, AIR 1936 Mad 103, *Anop Chand v Hirachand*, AIR 1962 Raj 223 ILR 1962 Raj 345

7. *Shaukat Hussain v Bhuneshwari Devi* (1972) 2 SCC 731 AIR 1973 SC 528 *Shri Krishna Singh v. Mathura Ahir*, (1981) 3 SCC 689 AIR 1982 SC 686; *Hansraj v. Satnarain*, AIR

For the application of this rule, it is not enough that there is a suit pending by the judgment-debtor. Such suit must be against the decree-holder in such court. The words "such court" are important and would mean that the suit must be pending in the same court.<sup>8</sup>

The provisions of Rule 29 are not peremptory but discretionary.<sup>9</sup> The discretion, however, must be exercised judicially and in the interests of justice and not mechanically and as a matter of course.<sup>10</sup> No hard and fast rule can be laid down in what cases stay would be granted or refused.<sup>11</sup> This rule is based on the principle that a judgment-debtor may not be harassed if he has a substantial claim against the decree-holder which is pending for the decision of the court executing the decree. If the court is of the view that there is some substance in the claim, it may order for the stay of execution filed by the defendant in that case but not otherwise.<sup>12</sup>

While exercising the discretion conferred under Rule 29, the court should duly consider that a party who has obtained a lawful decree is not deprived of the fruits of that decree except for good and cogent reasons.<sup>13</sup> So long as the decree is not set aside by a competent court, it stands good and effective and it should not be lightly dealt with so as to deprive the holder of the lawful decree of its fruits.<sup>14</sup> A party should not be deprived of the fruits of the decree obtained by him from a competent court merely because a suit has subsequently been filed for setting aside that decree. A decree passed by a competent court should be allowed to be executed and unless a strong case is made out on cogent grounds no stay should be granted.

Even if stay is granted it must be on such terms as to security, etc., so that the earlier decree is not made ineffective due to lapse of time.<sup>15</sup> The discretion of the court under Rule 29 has to be exercised with "very great care" and only in "special cases".<sup>16</sup> It cannot be exercised so as to allow a party to abuse the process of law.<sup>17</sup>

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1957 Raj 219; *Subhas Kumar v. Sheo Balak Singh*, AIR 1975 Pat 307; *Ram Nath v. Kali Prasad*, AIR 1999 Pat 48.

8. *Shaukat Hussain v. Bhuneshwari Devi*, (1972) 2 SCC 731; AIR 1973 SC 528.

9. *Anop Chand v. Hirachand*, AIR 1962 Raj 223, *Quazi Toufiqur Rahman v. Nurbanu Bibi*, AIR 1976 Gau 39.

10. *Quazi Rahman v. Nurbanu Bibi*, AIR 1976 Gau 39; *Quazi Talifiqur Rahman v. Sital Prasad*, AIR 1977 Gau 25.

11. Proviso to R. 29, *Judhistir Jena v. Surendra Mohanty*, AIR 1969 Ori 233.

12. *Anop Chand v. Hirachand*, AIR 1962 Raj 223 at p. 354; *Subhas Kumar v. Sheo Balak Singh*, AIR 1975 Pat 307.

13. *Judhistir Jena v. Surendra Mohanty*, AIR 1969 Ori 233.

14. *Quazi Toufiqur Rahman v. Nurbanu Bibi*, AIR 1976 Gau 39 at p. 40.

15. *Ibid*, at pp. 40-41.

16. *Shri Krishna Singh v. Mathura Ahir*, (1981) 3 SCC 689 at p. 426; AIR 1982 SC 686 at p. 689.

17. *Quazi Toufiqur Rahman v. Nurbanu Bibi*, AIR 1976 Gau 39 at p. 41.

Prior to the amendment in the Code in 1976, the jurisdiction to stay execution of a decree vested only in the court which passed the decree. Hence, when the decree was transferred by the court which passed it to another court, the transferee court had no power to stay its execution.<sup>18</sup> By virtue of the amendment of 1976, now the executing court is also competent to stay not only the decree passed by it, but also a decree passed by another court transferred to it for execution.<sup>19</sup>

It is submitted that the following observations of Misra, J. (as he then was) in the case of *Judhistir v. Surendra*<sup>20</sup> lay down correct law on the point:

*"The fundamental consideration is that the decree has been obtained by a party and he should not be deprived of the fruits of that decree except for good reasons. Until that decree is set aside, it stands good and it should not be lightly dealt with on the off-chance that another suit to set aside the decree might succeed ... The decree must be allowed to be executed, and unless an extraordinary case is made out, no stay should be granted. Even if stay is granted, it must be on suitable terms so that the earlier decree is not stifled."*<sup>21</sup>

(emphasis supplied)

The proviso has been added by the Amendment Act of 1976. It enacts that if the decree is for payment of money and if the court grants stay without requiring security, it shall record its reasons for doing so.<sup>22</sup>

## 5. ORDER OF INJUNCTION AND ORDER OF STAY: DISTINCTION

There is distinction between an order of injunction and an order of stay. The former is an order against a person or an individual restraining him from doing something. The latter is a direction or an order to a court not to do something. Proceedings taken in contravention of injunction-order are not null and void being without jurisdiction. The effect of non-compliance of an order of injunction may make the person liable to punishment. Proceedings in contravention of an order of stay, on the other hand are a nullity and of no effect whatsoever.<sup>23</sup>

18. *Shaukat Hussain v. Bhuneshwari Devi*, (1972) 2 SCC 731 AIR 1973 SC 528, *Shri Krishna Singh v. Mathura Ahir*, (1981) 3 SCC 689; AIR 1982 SC 686.

19. R 29; see also *H.L. Nantha v. T.C. Ramalingam*, AIR 1978 Mad 269.

20. AIR 1969 Ori 233.

21. *Ibid.*, at p. 234. See also *Subhas Kumar Singh v. Sheo Balak Singh*, AIR 1975 Pat 307; *Quazi Toufiqur Rahman v. Nurbanu Bibi*, AIR 1976 Gau 39, *Quazi Talifur Rahman v. Sital Prasad* AIR 1977 Gau 25.

22. *Teja Singh Mehta and Co v Grindlays Bank Ltd.*, (1982) 3 SCC 199.

23. *Subhas Kumar v. Sheo Balak Singh*, AIR 1975 Pat 307. *Trimbakrao v. Sampatrao*, AIR 1933 Nag 153, *Mulraj v. Murti Reghunathji Maharaj*, AIR 1967 SC 1386 (1967) 3 SCR 84.

## CHAPTER 5

# Mode of Execution

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### 1. GENERAL

The Code lays down various modes of execution. After the decree-holder files an application for execution of a decree, the executing court can enforce execution. The substantive provision (Section 51) "merely enumerates different modes of execution in general terms, while the conditions and limitations under which alone the respective modes can be availed of are prescribed further by different provisions". (Order 21)<sup>1</sup>

1. *Mahadeo Prasad Singh v. Ram Lochan*, (1980) 4 SCC 354 at pp. 360, 363.

A decree may be enforced by delivery of any property specified in the decree, by attachment and sale or by sale without attachment of any property, or by arrest and detention in civil prison of the judgment-debtor or by appointing a receiver, or by effecting partition, or in such other manner as the nature of the relief may require.<sup>2</sup>

## 2. CHOICE OF MODE OF EXECUTION

The Code allows more than one mode of execution of decrees.<sup>3</sup> As a general rule, a decree-holder has an option to choose a particular mode for executing and enforcing a decree passed by a competent court in his favour.<sup>4</sup> It is for him to decide in which mode he will execute his decree. This power, however, is "subject to such conditions and limitations as may be prescribed" by the Code.<sup>5</sup> It is also subject to the discretion of the court.<sup>6</sup>

2. S. 51; see also *Halsbury's Laws of England* (4th Edn.) Vol. 17, para 401 at pp. 232-33.

3. S. 51, reads as under:

"51. *Powers of Court to enforce execution.*—Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree:

- (a) by delivery of any property specifically decreed;
- (b) by attachment and sale or by sale without attachment of any property;
- (c) by arrest and detention in prison for such period not exceeding the period specified in Section 58, where arrest and detention is permissible under that section;
- (d) by appointing a receiver; or
- (e) in such other manner as the nature of the relief granted may require.

Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied:

- (a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree,:
  - (i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or
  - (ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, or

### 3. SIMULTANEOUS EXECUTION

Section 51 of the Code is very wide and permits execution of decrees by different modes. It gives an option to the decree-holder of enforcing a decree by several modes available under the Code. As a general rule, therefore, a court passing a decree against the defendant should not ordinarily place any limitation as to the mode in which it is to be executed.

In *Padrauna Rajkrishna Sugar Works Ltd. v. Land Reforms Commr.*<sup>7</sup>, income tax dues were sought to be realised as arrears of land revenue by selling immovable property of the company. It was contended by the company that the Collector at the first instance ought to have sold movables. Negating the contention and upholding the action of the Collector, the Supreme Court stated, "[T]he Code of Civil Procedure imposes no obligation to recover the dues by sale of movables or by arrest and detention of the defaulter before immovable property may be attached."<sup>8</sup>

(emphasis supplied)

In *Shyam Singh v. Collector, Distt. Hamirpur*<sup>9</sup> for recovery of certain debts, simultaneous proceedings for attachment and sale of movable as well as immovable property were taken. Upholding the action and following *P.R. Sugar Works*<sup>10</sup>, the Supreme Court observed:

"It has been said the difficulties of a litigant 'begin when he has obtained a decree'. It is a matter of common knowledge that far too many obstacles are placed in the way of a decree-holder who seeks to execute his decree against the property of the judgment-debtor. Perhaps because of that there is no statutory provision against a number of execution proceedings continuing concurrently. Section 51 of the Code gives an option to the creditor, of enforcing the decree either against the person or the property of the debtor; and nowhere it has been laid down that execution against the person of the debtor shall not be allowed unless and until the decree-holder has exhausted his remedy against the property."<sup>11</sup>

(emphasis supplied)

It is, however, necessary to note that discretion is with the court to order simultaneous execution and that discretion must be exercised judicially. The court can refuse simultaneous execution by allowing the decree-holder to avail of only one mode of execution at a time.<sup>12</sup>

In *Anandi Lal v. Ram Sarup*<sup>13</sup>, the Full Bench of the High Court of Allahabad stated, "... [A]ll the various modes mentioned in Section 51

7. (1969) 1 SCC 485; AIR 1969 SC 897.

8. *Ibid*, at pp. 489-90 (SCC) at p. 901 (AIR) (per Shah, J.).

9. 1993 Supp (1) SCC 693.

10. *Padrauna Rajkrishna Sugar Works Ltd. v. Land Reforms Commr.*, (1969) 1 SCC 485; AIR 1969 SC 897.

11. *Ibid*, at p. 700 (SCC); see also *Ram Narayan v. State of U.P.*, (1983) 4 SCC 276; AIR 1984 SC 1213.

12. Or. 21 R. 21; see also, *Shyam Singh v. Collector, Distt. Hamirpur*, 1993 Supp (1) SCC 693.

13. AIR 1936 All 495; 1936 All LJ 605 (FB).

are not open to an executing court in every case; it is to be guided by the procedure laid down in the schedule, and must resort to the method appropriate to each case."<sup>14</sup>

In *Shyam Singh v. Collector, Distt. Hamirpur*<sup>15</sup>, the Supreme Court observed, "[I]n the initial dispute, and as such, courts have to aid the creditor in realising the dues from the debtor. But at the same time in the special facts and circumstances of a particular case, the court can direct the decree-holder or the creditor not to put any property on sale if, by the mode already opted by the decree-holder or the creditor, the amount due has been realised or likely to be realised without any further delay."

It is submitted that the following observations in *Mono Mohan v. Upendra Mohan*<sup>16</sup>, lay down correct law on the point. The Full Bench of the High Court of Calcutta stated:

"It is quite true that in Section 51 of the Code the remedies open to a judgment-creditor are detailed in the five clauses (a) to (e) to that section and it is also true that where the holder of a decree for money comes before the Court and wants process against the person of a judgment-debtor for his arrest, and if there are no special circumstances present, it is not open to the Court to say that the decree-holder must proceed against the properties of the judgment-debtor before applying for warrant of arrest against him ... But we are clearly of opinion that there may be circumstances present in a case which would not only justify a refusal to allow the decree-holder to have process for the arrest and detention of the judgment-debtor, but, we are prepared to go further and say that there may be circumstances which would demand such a refusal."<sup>17</sup>

(emphasis supplied)

#### 4. DISCRETION OF COURT

Though it is for the decree-holder to choose a particular mode of executing his decree and it is permissible in law to opt for even a simultaneous execution, "the court may, in its discretion, refuse execution at the same time against the person and property of the judgment-debtor".<sup>18</sup>

14 *Ibid* at p 502 (AIR) (per Sulaiman, C J)

15 1993 Supp (1) SCC 693 at p 702

16 AIR 1935 Cal 127 154 IC 606 38 CWN 1085

17 *Ibid*, at p. 129 (AIR), see also *A K Subramania Chettiar v A Ponnuswami Chettiar* AIR 1957 Mad 777 (1957) 1 MLJ 208 *Uma Kanta v Renwick & Co* AIR 1953 Cal 717 *Mahadeo Prasad Singh v Ram Lochan*, (1980) 4 SCC 354 at pp 360, 363 AIR 1981 SC 416 *Ram Lochan v Mahadeo Prasad* AIR 1970 All 544 (FB)

18 Or 21 R 21, see also *Anandi Lal v Ram Sarup*, AIR 1936 All 495 *Mono Mohan v Upendra Mohan*, AIR 1935 Cal 127, *Padrauna Raykrishna Sugar Works Ltd v Land Reforms Commr*, (1960) 1 SCC 485

## 5. MODES OF EXECUTING DECREES

The Code lays down the following modes for execution of different types of decrees:

### (1) Delivery of property

#### (a) Movable property: Section 51(a), Rule 31

Where the decree is for any specific movable property, it may be executed (i) by seizure and delivery of the property; or (ii) by detention of the judgment-debtor; or (iii) by the attachment and sale of his property; or (iv) by attachment and detention both.<sup>19</sup> The words *specific movable* (property) do not include money and, therefore, a decree for money cannot be executed under Rule 31.<sup>20</sup> Again, for the application of this rule the property must be in the possession of the judgment-debtor. Where the property is in the possession of a third party, the provisions of this rule do not apply and the property cannot be attached.<sup>21</sup>

#### (b) Immovable property: Rules 35-36

Rules 35 and 36 provide the mode of executing decrees for possession of immovable property to the decree-holder. Rules 35 and 36 correspond to Rules 95 and 96 which lay down the procedure for delivery of possession to the auction-purchaser who has purchased the property in an auction-sale.<sup>22</sup> Where the decree is for immovable property in the possession of the judgment-debtor or in the possession of the person bound by the decree, it can be executed by removing the judgment-debtor or any person bound by the decree and by delivering possession thereof to the decree holder.

If the decree-holder satisfactorily establishes identity of decretal property, the decree must be executed by the court by putting the decree-holder in possession thereof.<sup>23</sup> Possession delivered in this manner is known as *khas* or *actual* possession. But if such property is in the possession of a tenant or other person entitled to occupy the same and not bound by the decree, the delivery of the property should be made by affixing a copy of the warrant at some conspicuous place on the property and proclaiming to the occupant by beat of drum or other

19. R. 31.

20. *Netumprakkot Kumath v. Nelumprokkotti Kumath*, AIR 1914 Mad 572; ILR (1914) 37 Mad 381; *Karnani Industrial Bank Ltd. v. Baraboni Coal Concern Ltd.*, AIR 1938 Cal 471.

21. *Pudmanund Singh v. Chundi Dat*, (1896) 1 CWN 170.

22. For detailed discussion, see *infra*, Chap. 10.

23. *Shafiqur Rehman v. Mohd. Jahan Begum*, (1982) 2 SCC 456.

customary mode at some convenient place the substance of the decree regarding the property. This is known as *symbolical* or *formal* possession.

The ambit and scope of Rules 35 and 36 (*khas* or actual and symbolic or formal possession) has been appropriately explained by Srivastava, J. in the case of *Shamsuddin v. Abbas Ali*<sup>24</sup> in the following words:

"It appears to me that the possession referred to in sub-rules (1) of (3) of Order 21 Rule 35 is *khas* or actual possession, while that referred to in sub-rule (2) and Rule 36 is formal or symbolical possession. Formal or symbolical possession is delivered by fixing a copy of the warrant in some conspicuous place of the property and proclaiming by the beat of drum or other customary mode at some convenient place the substance of the decree. Rules 35 and 36 refer to cases where a suit is brought for possession of immovable property and a decree is passed in the suit for the delivery of the property to the decree-holder. If the immovable property of which possession is directed by the decree to be delivered to the decree-holder is in the possession of the judgment-debtor, actual possession must be delivered to the decree-holder under sub-rule (1) of Rule 35. Where it is in the possession of a tenant or other person entitled to occupy the same, only symbolical possession can be delivered, and that is to be done under Rule 36. Symbolical possession can in such cases operate as actual possession against the judgment-debtor."<sup>25</sup>

Where the decree is for joint possession of immovable property, possession can be delivered by affixing a copy of the warrant at some conspicuous place of the property and proclaiming by beat of drum, or by other customary mode at some convenient place, the substance of the decree.<sup>26</sup>

Where the person in possession and bound by the decree does not afford free access, the officers of the court may, after giving reasonable warning and facility to a *pardanashin* lady to withdraw, break open into the building and put the decree-holder in possession thereof.<sup>27</sup>

The expression "any person bound by the decree" includes the judgment-debtor as well as any other person bound by such decree.<sup>28</sup> A sub-tenant is bound by a decree of ejectment passed against a tenant.<sup>29</sup> Similarly, a decree passed against a *benamidar* binds the real owner.<sup>30</sup>

24. AIR 1971 All 117.

25. *Ibid*, at p 121 (AIR), see also *Balwant Narayan v M D Bhagwat*, (1976) 1 SCC 700 AIR 1975 SC 1767, *Ram Prasad v Bakshi Bindeshwari Prasad*, AIR 1932 Pat 145 ILR (1932) 11 Pat 165.

26. R 35(2).

27. R 35(3), see also *B Gangadhar v B G Rajalingam* (1995) 5 SCC 238 AIR 1996 SC 780.

28. *Sk Yusuf v Jyotish Chandra*, AIR 1932 Cal 241, *Patel Naranbhai v Dhulabhai* (1992) 4 SCC 264 AIR 1992 SC 2009.

29. *Shri Jagadguru Gurushiddaswami G G Murusawarmath v D M D Jain Sabha*, AIR 1953 SC 514 1954 SCR 235, *Anand Niwas (P) Ltd v Anand Kalyani & Pedhi*, AIR 1965 SC 414.

30. *Patel Naranbhai v Dhulabhai*, (1992) 4 SCC 264 AIR 1992 SC 2009.

The executing court can also award mesne profits as an integral power to order delivery of possession and consequential to unlawful retention of possession of property.<sup>31</sup>

## (2) Attachment and sale of property: Section 51(b)

Section 51(b) empowers the court to order execution of a decree by attachment and sale or by sale without attachment of any property. The court is competent to attach the property if it is situated within the local limits of the jurisdiction of the court.<sup>32</sup> It is immaterial that the place of business of the judgment-debtor is outside the jurisdiction of the court.<sup>33</sup>

The words *attachment* and *sale* in clause (b) of Section 51 are to be read disjunctively.<sup>34</sup> Hence, the attachment of the property is not a condition precedent.<sup>35</sup> Sale of property without an attachment is not void or without jurisdiction and does not vitiate such sale. It is merely an irregularity.<sup>36</sup>

An order of attachment takes effect from the moment it is brought to the notice of the court.<sup>37</sup> Rule 54 provides for the attachment of immovable property and the procedure for the proclamation of such attachment.<sup>38</sup> The object of Rule 54 is to inform the judgment-debtor about the attachment so that he may not transfer or create encumbrance over the property thereafter.<sup>39</sup>

## (3) Arrest and detention: Section 51(c)

It is for the decree-holder to decide in which of the several modes he will execute his decree. One of such modes of executing a decree is arrest and detention in civil prison of the judgment-debtor. However, clause (c) should be read subject to the proviso to Section 51.<sup>40</sup>

31. *Ibid*, at p. 271 (SCC).

32. *M. A. A. Raoof v. K. G. Lakshmi pathi*, AIR 1969 Mad 268: (1968) 2 Mad LJ 34.

33. *Ibid*.

34. *Amulya Chandra v. Pashupati Nath*, AIR 1951 Cal 48 (FB); *Nar Singh Datt v. Ram Pratap*, AIR 1961 All 436.

35. *Krishnamukhlal v. Bhagwan Kashidas*, AIR 1974 Guj 1: (1973) 14 Guj LR 280; *Karnataka Bank Ltd. v. K. Shamanna*, AIR 1972 Mys 321; *Janki Vallabh v. Moolchand*, AIR 1974 Raj 168.

36. *Rahim Bux Haji & Sons v. Firm Samiullah & Sons*, AIR 1963 All 320.

37. *Viswanathan v. Muthuswamy Gounder*, AIR 1978 Mad 221.

38. For detailed discussion, see *infra* Chaps. 9, 10.

39. *Desh Bandhu Gupta v. N. L. Anand*, (1994) 1 SCC 131.

40. S. 51(c); see also *Jolly George Varghese v. Bank of Cochin*, (1980) 2 SCC 360: AIR 1980 SC 470, *Prem Ballabh v. Mathura Datt*, AIR 1967 SC 1342: (1967) 2 SCR 298. *Shyam Singh v. Collector, Distt Hamirpur*, 1993 Supp (1) SCC 693.

The proviso lays down that where the decree is for payment of money, execution by detention in civil prison should not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be so detained, the court for reasons to be recorded in writing is satisfied (i) that the judgment-debtor with the object of obstructing or delaying the execution of the decree (a) is likely to abscond or leave the local limits of the jurisdiction of the court; or (b) has, after the institution of the writ in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property; or (ii) that the judgment-debtor has, on or after, since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same; or (iii) that the decree is for a sum which the judgment-debtor was bound in a fiduciary capacity to account for."

These provisions are mandatory in nature and must be strictly complied with. They are not punitive in character. The object of detention of a judgment-debtor in a civil prison is two-fold. On the one hand, it enables the decree-holder to realise the fruits of the decree passed in his favour; while on the other hand, it protects the judgment-debtor who is not in a position to pay the dues for reasons beyond his control or is unable to pay. Therefore, mere failure to pay the amount does not justify arrest and detention of the judgment-debtor inasmuch as he cannot be held to have neglected to pay the amount to the decree-holder.

#### (4) Appointment of Receiver: Section 51(d)

One of the modes of execution of a decree is the appointment of a receiver. Execution by appointment of a receiver is known as equitable execution and is entirely at the discretion of the court. It cannot be claimed as of right. It is thus an exception to the general rule stated above that it is for the decree-holder to choose the mode of execution and that the court has no power to refuse the mode chosen by him.

The appointment of a receiver in execution proceedings is considered to be an exceptional remedy and a very strong case must be made out in support of it.<sup>41</sup> The decree-holder before resorting to this mode must

41. Proviso to § 51, see also *George Varghese v. Bank of Ceylon* (1988) 2 SCL 360.

42. See *Arrest and Detention*, *supra*. For detailed discussion and case law, see Part II, Chapter 2.

43. *Prakash Sankar* (1972) 2 App 37-50, *Shephard & Co. (1880) 43 Ch D 131 (CA)*, *Sankshita Lakshmi v. Karu Ram*, AIR 1961 Pat 138, *Doreen v. Nath*, S.A. 1964 Decc. AIR 1964 Pat 406.

44. *Ibid.* See also *Ankarlal v. V.S. Rampal*, AIR 1966 Raj 170.

45. *Bhogwal, Babu Padma Devi*, AIR 1955 Agn 58, *Ankarlal v. V.S. Rampal*, AIR 1961 Raj 175, *Doreen v. Nath*, S.A. 1964 Decc. AIR 1964 Pat 406.

show that there is no effective remedy for obtaining relief by the usual statutory modes of execution.<sup>46</sup> The court also must be satisfied that the appointment of a receiver is likely to benefit both the decree-holder and the judgment-debtor rather than a sale of the attached property.<sup>47</sup> It has also to be satisfied that the decree is likely to be realised within a reasonable time from the attached properties so that the judgment-debtor may not be burdened with property while he is deprived of the enjoyment of it.<sup>48</sup> Again, this mode of execution cannot be resorted to in order to circumvent the statutory provisions.<sup>49</sup>

Thus, the decree-holder cannot be permitted to pray for the appointment of a receiver in respect of property which has been expressly excluded from attachment by the statute.<sup>50</sup> The provident fund amount standing to the credit of a retired government servant is exempt from attachment and sale under the provisions of the Provident Funds Act, 1925. Since no execution can lie against such amount, no receiver can be appointed for the said sum.<sup>51</sup> A receiver can be appointed even before the attachment of the property,<sup>52</sup> and even in respect of the property situate outside the territorial jurisdiction of the court.<sup>53</sup>

This section, however, should be read with the provisions of Order 40 Rule 1 regarding the appointment of a receiver and his powers.<sup>54</sup>

### (5) Partition: Section 54

Where a decree is for partition or separate possession of a share of an undivided estate assessed to the payment of revenue to the Government, execution should be effected by the Collector.<sup>55</sup>

46. *Nawab Bahadur v. Karnani Industrial Bank Ltd.*, (1930-31) 58 IA 215; AIR 1931 PC 160; *Ambalal v. Vijai Singh*, AIR 1955 A JM 61; *Saileshwar Lakhaiyar v. Kanti Kumar*, AIR 1965 Pat 238.

47. *Toolsa Golal v. John Antone*, ILR (1887) 11 Bom 448; *Partap Singh v. Delhi & London Bank Ltd.*, ILR (1908) 30 All 393.

48. *Hemendra Nath Roy v. Prokash Chandra*, AIR 1932 Cal 189; *Nawab Bahadur v. Karnani Industrial Bank Ltd.*, (1930-31) 58 IA 215; *Onkarlal v. V.S. Rampal*, AIR 1961 Raj 179.

49. *Kerr on Receivers* (1972) at pp. 84-87; *Union of India v. Hira Devi*, AIR 1952 SC 227; 1952 SCR 765.

50. *Toolsa Golal v. John Antone*, ILR (1887) 11 Bom 448; *Partap Singh v. Delhi & London Bank Ltd.*, ILR (1908) 30 All 393.

51. *Union of India v. Hira Devi*, AIR 1952 SC 227; *Union of India v. Radha Kissan*, (1969) 1 SCC 225; AIR 1969 SC 762; *Union of India v. Jyoti Chit Fund and Finance*, (1976) 3 SCC 607; AIR 1976 SC 1163.

52. *Nawab Bahadur v. Karnani Industrial Bank Ltd.*, (1930-31) 58 IA 215; *Vakharia & Sons v. Kantilal*, (1970) 11 GLR 1069.

53. *Dhirendra Nath v. Santasila Debi*, AIR 1969 Cal 406.

54. For detailed discussion about "Receiver", see *supra*, Pt. II, Chap. 11.

55. S 54; see also *Sanjay Dinkar v. State of Maharashtra*, (1986) 1 SCC 83; AIR 1986 SC 414; *Ramrathibal v. Surajpal*, AIR 1995 Bom 445; *Chintaman v. Shankar*, (1999) 1 SCC 76.

The object underlying this provision is twofold: *firstly*, the revenue authorities are more conversant and better qualified to deal with such matters than the civil court<sup>56</sup>, and *secondly*, the interests of the Government with regard to the revenue-paying estate would be better safeguarded by the Collector than by the court.<sup>57</sup>

## (6) Cross-decrees and cross-claims: Rules 18-20

Rules 18 to 20 of Order 21 deal with set-off of cross-decrees and cross-claims.

### (a) Cross-decrees: Rules 18, 20

(i) *Doctrine explained.*—Rule 18 enacts that cross-decrees for the payment of money shall be set-off against each other. If the amounts under the two decrees are equal then both the decrees shall satisfy each other and full satisfaction will be recorded and no payment is required to be made by any party and no execution will be allowed to be taken out.

If, on the other hand, the amounts under the two decrees are unequal then full satisfaction will be recorded upon the decree for the smaller amount, and part satisfaction upon the decree for the larger amount, and the execution will be allowed only for the balance.

(ii) *Illustrations.*—This principle may be explained by the following two illustrations:

- (i) A holds a decree against B for Rs 10,000. B also holds a decree against A for the same amount (i.e. Rs 10,000). A and B each applies for the execution of his decree to court C which is having jurisdiction to execute both the decrees. The decrees, being cross-decrees, will be set-off against each other fully and neither party will be allowed to take out execution.
- (ii) If in the above illustration B holds a decree against A only for Rs 5000, i.e. for the smaller amount, he will not be allowed to take out execution of his decree. Execution will only be allowed of A's decree to the extent of Rs 5000 being difference between the two decrees which remains due after the set-off.

(iii) *Object.*—The underlying object of this rule has been explained by Their Lordships of the Privy Council in the case of *Hazari Ram v Rai Bahadur Bansidhar*<sup>58</sup>, in the following words, "It is true that under Rules 18 to 20, the set-off of decrees is not a discretionary matter depending

56 *Bhimangauda Konapgauda Patil v Hanmant Rangappa Patil*, AIR 1918 Bom 206

57 *Zahrin v Goweri Sunkar*, ILR (1888) 15 Cal 198 & *V Srinivasathathachar v Narayalur Srinivasathathachar*, AIR 1933 Mad 259. *Khemchand Shankar v Vishnu Hari*, (1983) 1 SCC 18 AIR 1983 SC 124

58 *Hazari Ram v Rai Bahadur Bansidhar*, (1936-37) 64 IA 67 AIR 1937 PC 39

upon equitable considerations such as may emerge from the circumstance that both decrees arise out of the same transaction. Whatever they arise from, *circuitry of proceedings thereunder can be avoided and should be avoided. This is the principle of the rules.*"<sup>59</sup> (emphasis supplied)

(iv) *Extent and applicability.*—Over and above ordinary suits, the provisions of Rules 18-20 also apply to mortgage suits.<sup>60</sup> The court has also power to allow set-off to cases not strictly covered by Rule 18<sup>61</sup>

(v) *Conditions.*—In order that this rule may apply, the following conditions must be satisfied:

- (1) The decrees must be for the payment of different sums of money;
- (2) They must have been passed in separate suits;
- (3) The decree-holder in one decree must be the judgment-debtor in the other decree; and
- (4) Each party must fill the same character in both the suits.

#### *Illustrations*

- (a) A and B, co-plaintiffs, obtain a decree for Rs 1000 against C, and C obtains a decree for Rs 1000 against B. C cannot treat his decree as a cross-decree under this rule.
- (b) A obtains a decree against B for Rs 1000. C who is a trustee for B obtains a decree on behalf of B against A for Rs 1000. B cannot treat C's decree as a cross-decree under this rule.
- (c) A, B, C, D and E are jointly and severally liable for Rs 1000 under a decree obtained by F. A obtains a decree for Rs 100 against F singly and applies for the execution to the court in which the joint-decree is being executed. F may treat his joint-decree as a cross-decree under this rule.
- (5) Both the decrees must be capable of execution by the same court at the same time.

#### *Illustration*

- (d) A holds a decree against B for Rs 1000. B holds a decree against A for the payment of Rs 1000 in case A fails to deliver certain goods at a future day. B cannot treat his decree as a cross-decree under this rule.
- (6) Applications should have been made to the court for execution of both the decrees.

(vi) *Test.*—In deciding whether the two decrees are cross-decrees, one must look at the substance and not the form.<sup>62</sup>

59. *Ibid.*, at p. 41 (AIR) (*per* Sir George Rankin).

60. R. 20.

61. *Lakshmichand v. State of A P.*, (1987) 1 SCC 19 at p. 22: AIR 1987 SC 20.

62. *Bansidhar v. Hazari Ram*, AIR 1933 Pat 210 at p. 20: 143 IC 542.

**(b) Cross-claims: Rules 19-20**

(i) *Doctrine explained.*—Rule 19 provides for a set-off in the case of cross-claims in the same decree. It lays down that if the two sums in cross-claims under the same decree are equal, satisfaction of each shall be entered in the decree and no execution shall be allowed to be taken out. If the two sums are unequal, the party entitled to the larger sum may take out execution for the balance.

(ii) *Object.*—The principal object of Rule 19 is to prevent each side executing a decree in respect of sums due under the same decree. This is a rule of procedure based on the principle of equity that a party who is liable to pay under a decree cannot be allowed to recover under that decree if the amount which he is entitled to recover is smaller than the amount which he is liable to pay.<sup>63</sup>

(iii) *Extent and applicability.*—The provisions of Order 21 Rules 18-20 apply to ordinary suits, mortgage suits and other suits not covered by the provisions of the Code.<sup>64</sup>

(iv) *Conditions.*—For the applicability of the rule, it must be shown that the party seeking the relief to recover a sum of money under the very same decree which is sought to be executed by the opposite party. To put it differently, there should be two rival claims by contesting parties against each other arising out of one and the same decree sought to be executed by one against the other party.<sup>65</sup>

(v) *Material date for satisfaction.*—The material date for the satisfaction of the decree is the date of decree itself.<sup>66</sup>

**(7) Payment of money: Rules 2, 30****(a) Nature and scope**

A decree for payment of money (simpliciter or as an alternative to some other relief) may be executed by attachment and sale of property of the judgment-debtor or by his detention in civil prison or by both.<sup>67</sup>

The provision is not exhaustive and does not override other provisions of the Code.<sup>68</sup> Hence, a decree for payment of money can be

63 *Thacker Rarji v. Thacker Kesharbai*, AIR 1954 Kutch 55, *Kotigari Rangiah Chetti v. Chintalapalli Narasayya*, AIR 1917 Mad 226, *Rangiah v. Narasaya*, AIR 1991 Mad 226.

64 R 20, see also *Lakshmichand v. State of A P.*, (1987) 1 SCC 19 at p. 22 AIR 1987 SC 20.

65 *Mahendra Singh v. Dataram Jagannath*, (1998) 9 SCC 28 at pp. 37-38 AIR 1998 SC 1219 at p. 1225.

66 *Sreepathi Achariyar v. Sankaranarayana Iyer*, 1961 Ker LT 875 (1961) 2 Ker LR 478.

67 R 30.

68 *Saraswatibai v. Govindrao Keshavrao*, AIR 1961 MP 145 (FB) 1961 MP LJ 256 (FB).

### MODES OF PAYING MONEY

The law of England has adopted the principle that the creditor is entitled to the money in the most convenient manner, and the debtor is bound to pay in the manner which is most convenient for the creditor. This principle is applied in the following cases:

#### 1. PAYMENT BY CHECK

A check is a written order by one person to another to pay a certain sum of money to a third person. It is a negotiable instrument, and its payment is governed by the law of negotiable instruments. The law of England has adopted the principle that the creditor is entitled to the money in the most convenient manner, and the debtor is bound to pay in the manner which is most convenient for the creditor. This principle is applied in the following cases:

#### 2. PAYMENT BY NOTE

A note is a written promise by one person to another to pay a certain sum of money to a third person. It is a negotiable instrument, and its payment is governed by the law of negotiable instruments. The law of England has adopted the principle that the creditor is entitled to the money in the most convenient manner, and the debtor is bound to pay in the manner which is most convenient for the creditor. This principle is applied in the following cases:

#### 3. PAYMENT BY DEBIT TO THE CREDITOR'S ACCOUNT

The law of England has adopted the principle that the creditor is entitled to the money in the most convenient manner, and the debtor is bound to pay in the manner which is most convenient for the creditor. This principle is applied in the following cases:

#### 4. PAYMENT BY DEBIT TO THE CREDITOR'S ACCOUNT

The law of England has adopted the principle that the creditor is entitled to the money in the most convenient manner, and the debtor is bound to pay in the manner which is most convenient for the creditor. This principle is applied in the following cases:

#### 5.

When the payment is made out of court, the following particulars must be accurately stated:<sup>77</sup>

- (i) The number of the original suit;
- (ii) The names of the parties or where there are more than two plaintiffs or more than two defendants, as the case may be, the names of the first two plaintiffs and the first two defendants;
- (iii) How the money remitted is to be adjusted, that is to say, whether it is towards the principal, interest or costs;
- (iv) The number of the execution case of the court, where such case is pending; and
- (v) The name and address of the payer.

This provision has been made with a view to furnish necessary details to the decree-holder as to the payment made by the judgment-debtor.

A payment made in accordance with Rule 1 of Order 21 discharges the judgment-debtor from decretal dues. On the amount being paid, interest shall cease from the date of payment.<sup>78</sup>

Where the decree-holder refuses to accept the postal money order or payment through a bank, interest shall cease to run from the date of such refusal.<sup>79</sup>

But the Code requires a certificate of payment or adjustment by the decree-holder and recording of such payment or adjustment by the executing court.<sup>80</sup> It also contemplates an application by the judgment-debtor informing the court of payment or adjustment. In that case, the court may give notice to the decree-holder to show cause why such payment or adjustment should not be recorded as certified. If the decree-holder fails to show cause against such certification, the court shall record payment or adjustment.<sup>81</sup>

#### (e) Certification of payment

No payment or adjustment can be recorded by the court at the instance of the judgment-debtor unless such payment has been made either in the court executing the decree, or as per the direction of the court which has passed the decree, or out of court to the decree-holder by postal money order or through a bank or by any other mode wherein payment is evident in writing; or such payment or adjustment is proved by documentary evidence, or such payment or adjustment is admitted by or on behalf of the decree-holder in his reply to the notice by the court or before the court.<sup>82</sup>

The object of certification is to ensure that the executing court should not be troubled with disputes with regard to payment or adjustment

77 R 1(3)

78 R 1(4), (5)

79 Provision to R 1(5)

80 R 2(1)

81 R 2(2)

82 R 2(2-A)

out of courts. The provision also seeks to avoid fraud in respect of payment made out of court.<sup>83</sup>

#### (f) Effect of payment

A payment made in accordance with the provisions of the Code operates as a valid discharge of the decree against the judgment-debtor.<sup>84</sup> When interest is awarded on the decretal amount by the court, it will cease to run on the sum deposited in the court or paid to the decree-holder or to any person as per the direction of the court.<sup>85</sup>

#### (g) Uncertified payment

The Code prohibits the executing court from recognising any payment or adjustment which has not been certified or recorded.<sup>86</sup> The rule is mandatory and prohibition is absolute. The bar applies as much to a total discharge as to a partial discharge. Payment or adjustment not certified under Rule 2(3) of Order 21 would not be recognized by the executing court.<sup>87</sup> It is, however, open to the judgment-debtor to contend before the executing court in answer to an execution application that the decree was satisfied and nothing remained to be paid to the decree-holder.<sup>88</sup>

### (8) Specific performance of contract: Rule 32

Where a decree is for specific performance of a contract, and the judgment-debtor wilfully disobeys it, it may be executed by attachment of his property, or by his detention in civil prison, or by both.<sup>89</sup>

A decree for specific performance creates mutual rights and liabilities in favour of both the parties. The defendant is as much entitled to

83. *Sultana Begum v. Prem Chand Jain*, (1997) 1 SCC 373; AIR 1997 SC 1006; *Padma Ben v. Yogendra Rathore*, (2006) 12 SCC 138; AIR 2006 SC 2167.

84. *Jagannath Prasad v. Chandrawati*, AIR 1970 All 309 at pp. 310-11 (FB), *Ahmad Hossain v. Bibi Naeman*, AIR 1963 Pat 30 at p. 34, *Padullaparthi Mutyala v. Padullaparthi Subbalakshmi*, AIR 1962 AP 311 at p. 310.

85. *Champalal v. Rupchand*, AIR 1968 Bom 363 at p. 365; (1968) 70 Bom LR 151; *Laxminarayan v. Ghasiram*, AIR 1939 Nag 191; *Amtul Habib v. Mohd. Yusuf*, AIR 1918 All 234.

86. *Bhabani Dasya v. Tulsi Ram Keot*, AIR 1990 Gau 90; *P. Narasaiah v. P. Rajoo Reddy*, AIR 1989 AP 264; *Nandagopal Gounder v. Kannan*, AIR 1988 Mad 224; *C.K. Xavier v. Bhagara Singh*, AIR 1987 Ker 145; *Moti Lal Banker v. Maharaj Kumar Mahmood Hasan Khan*, AIR 1968 SC 1087; (1968) 3 SCR 158.

87. *R. 2(2-A)*, see also *Sultana Begum v. Prem Chand*, (1977) 1 SCC 373; AIR 1977 SC 1006, *Badamo Devi v. Sagar Sharma*, (1999) 6 SCC 30; *Lakshmi Narayanan v. S.S. Pandian*, (2000) 7 SCC 240; AIR 2000 SC 2757.

88. *Ram Dass v. Mathura Lal*, (1982) 3 SCC 198.

89. *R. 32(1)*, see also *Saroj Rani v. Sudarshan Kumar Chadha*, (1984) 4 SCC 90. AIR 1984 SC 1562.

enforce the decree as the plaintiff.<sup>90</sup> Where the decree does not specify the time for performance of the contract, it should be performed within reasonable time.<sup>91</sup> Even if the decree for specific performance does not provide for delivery of possession, the court can deliver possession as incidental to the execution of the sale deed.<sup>92</sup> A party seeking to execute the decree for specific performance must fulfil the obligations imposed upon him by the decree. If he deposits considerations in the court, he is entitled to have the sale deed executed.

Where the party against whom a decree for specific performance has been passed is a Corporation, the decree may be enforced by attachment of the property of the Corporation or, with the leave of the court, by detention in civil prison of the directors or other principal officers thereof, or by both attachment and detention.<sup>93</sup>

### (9) Injunction: Rule 32

Where a decree is for injunction, and the judgment-debtor disobeys it, it may be executed by attachment of his property, or his detention in civil prison, or by both.<sup>94</sup>

The provision applies to prohibitory as well as mandatory injunctions.<sup>95</sup>

Where the party against whom a decree for an injunction has been passed is a Corporation, the decree may be enforced by attachment of the property of the Corporation or, with the leave of the court, by detention in civil prison of the directors or other principal officers thereof, or by both, attachment and detention.<sup>96</sup>

### (10) Restitution of conjugal rights: Rules 32-33

Where a decree is for restitution of conjugal rights, and the judgment-debtor wilfully disobeys it, it may be executed by attachment of his property.<sup>97</sup>

90. *Hungerford Investment Trust Ltd v. Haridas Mundhra*, (1972) 3 SCC 684 AIR 1972 SC 1826 at p. 1836, *Jai Narain v. Kedar Nath*, AIR 1956 SC 359 1956 SCR 62.

91. *Hungerford Investment Trust Ltd v. Haridas Mundhra*, (1972) 3 SCC 684

92. *Narendra Chandra v. Matangini Roy*, AIR 1971 Trp 1, *Sri Sri Janardan Kishore v. Giridhari Lal*, AIR 1957 Pat 701, *Dadulal v. Deo Kunwar*, AIR 1963 MP 86, *Pt. Balmukund v. Veer Chand* AIR 1954 All 643, *Subodh Kumar v. Hiramoni Dasi*, AIR 1955 Cal 267

93. R 32(2) 94. R 32(1).

95. Explanation to R 32, see also, *Sachi Prasad v. Amar Nath Rai*, AIR 1919 Cal 674 ILR (1919) 46 Cal 103 45 IC 864, *Paul v. Cheeran Narayanan*, AIR 1969 Ker 232, *Evuru Venkata Subbayya v. Sristi Veerayya*, AIR 1969 AP 92, *Sarup Singh v. Darvadhan Singh*, AIR 1972 Del 142 (FB)

96. R 32(2)

97. R 32(1), see also *Saroj Rani v. Sudarshan Kumar Chadha*, (1984) 4 SCC 90 AIR 1984 SC 1562.

A decree for restitution of conjugal rights cannot be executed by sending the person (husband or wife, as the case may be) to civil prison and the only permissible mode of executing the decree is attachment of the property of the judgment-debtor.<sup>98</sup>

Where the parents do not comply with the decree for restitution of conjugal rights, they can be dealt with under this provision.<sup>99</sup> Refusal by wife to live with her husband in unequivocal terms amounts to wilful disobedience.<sup>100</sup>

If the judgment-debtor obeys the decree and goes to live with the decree-holder, satisfaction can be entered of the decree. If the judgment-debtor is ready and willing to obey the decree, but the decree-holder obstructs execution thereof without reasonable cause, the court can, at the instance of the judgment-debtor, enter satisfaction of the decree.<sup>101</sup>

Where a decree is passed against the husband, the court, either at the time of passing the decree or at any time thereafter, may order that in the event of the decree being disobeyed within the period fixed by the court, the judgment-debtor shall make such periodical payments to the decree-holder (wife) as may be just and proper.<sup>102</sup>

The only sanction provided by law is by attachment of property of the defaulting judgment-debtor. This is an inducement offered by the court in an appropriate case to the husband or wife to live together in order to give them an opportunity to settle the matter amicably. *It serves a social purpose as an aid to the prevention of break up of marriage.*<sup>103</sup>

(emphasis supplied)

### (11) Execution of document: Rule 34

Where a decree is for the execution of a document and the judgment-debtor neglects or refuses to obey the same, the court shall, after giving an opportunity to the decree-holder as well as to the judgment-debtor to prepare a draft of the document in accordance with the terms of the decree, execute a document in the prescribed form. It shall have the same effect as the execution of a document by the party ordered to execute the same.<sup>104</sup>

98. *Sheo Kumari v. Mathura Ram*, AIR 1936 All 657; *Vankar Kuber v. Vankar Lilaben*, (1979) 20 Guj LR 584; 1979 Hin LR 559.

99. *M J. Sivarama v. V. Veerappa*, AIR 1914 Mad 219.

100. *Pedapudi Nookaratnam v. Pedapudi Venkata*, AIR 1949 Mad 374; *M P. Shreevastava v. Veena*, AIR 1965 Punj 54; ILR (1964) 2 Punj 803.

101. *Sreevastava v. Veena*, AIR 1965 Punj 54; ILR (1964) 2 Punj 803.

102. *Saroj Rani v. Sudarshan Kumar Chadha*, (1984) 4 SCC 90; AIR 1984 SC 1562 (per Mukharji, J.).

103. *Ibid*, at p. 1568 (AIR) (para 17).

104. R. 34; see also *Pratibha Singh v. Shanti Devi*, (2003) 2 SCC 330; AIR 2003 SC 643

Where the document to be executed does not relate to the subject-matter of the suit, the provision will not apply.<sup>105</sup> A document executed by the court shall be treated as executed by the party himself.<sup>106</sup>

Where the decree is for the execution of a document, the executing court has to determine whether the draft document is in conformity with the terms of the decree. The court, for that purpose, may scrutinize the document and may also make alterations in the draft to bring it in conformity with the terms of the decree.<sup>107</sup>

An order made under this provision is appealable.<sup>108</sup>

### (12) Endorsement of negotiable instrument: Rule 34

Where a decree is for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the court shall, after giving an opportunity to the decree-holder as well as to the judgment-debtor to prepare a draft of endorsement in accordance with the terms of the decree, endorse a negotiable instrument in the prescribed form. It shall have the same effect as the endorsement to the negotiable instrument by the party ordered to endorse the same.<sup>109</sup>

An order made under this provision is appealable.<sup>110</sup>

### (13) Attachment of rent, mesne profits, etc.: Rule 42

Where a decree is for unascertained rent, or mesne profits, or any other matter, the court may order attachment of the property of the judgment-debtor before the amount due from him is ascertained.<sup>111</sup> Such attachment, however, cannot affect any interest created in the property prior to the attachment.<sup>112</sup>

The expression "any other matter" should be construed *ejusdem generis*.<sup>113</sup> It covers matters similar to rent and mesne profits. An attachment under this rule is in the execution. It is thus similar to attachment before judgment.<sup>114</sup> A decree-holder applying for attachment under this provision can claim rateable distribution.<sup>115</sup>

105. *Saudamini Dasi v. Behary Lal*, (1920) 25 CWN 68 61 IC 535.

106. *Neelakantan Velu v. Gheervarghese Koruthu*, ILR 1960 Ker 678, *Kantilal v. Snehlata*, (1979) 20 Guj LR 490 at pp 494-95, *Harshad Chiman Lal Modi v. DLF Universal Ltd.*, (2005) 7 SCC 791 AIR 2005 SC 4446.

107. *Sashimohan v. Monomohan*, AIR 1971 A&N 118 1970 Ass LR 52.

108. Or 43 R 1(i)                      109. R 34                      110. Or 43 R 1(i)

111. R 42

112. *Paul Bros. v. Ashim Kumar* (1990) 3 SCC 726 at p 733 AIR 1991 SC 796.

113. *Dasarathi v. Krishna*, (1961) 27 Cut LT 412.

114. *Jagat Tarini Dasi v. Surampayan Pal*, AIR 1941 Cal 357 ILR (1941) 1 Cal 363 196 IC 247.  
For detailed discussion see *supra*, Chap 11.

115. *Paul Bros. v. Ashim Kumar* (1990) 3 SCC 726.

### (14) Liability of surety: Section 145

Where any person has furnished security or given a guarantee (a) for the performance of any decree or any part thereof; or (b) for the restitution of any property taken in execution of a decree; or (c) for the payment of any money, or the fulfilment of any condition imposed on any person, under an order of the court in any suit or in any proceeding consequent thereon; the decree or order may be executed (i) if he has rendered himself personally liable, against him to that extent; (ii) if he has furnished any property as security, by sale of such property to the extent of the security; (iii) if the case falls under both the clauses, i.e. he has rendered himself personally liable as well as has furnished security, then to the extent specified in clauses (i) and (ii) above. The person who has furnished security or given a guarantee shall be deemed to be a party within the meaning of Section 47.<sup>116</sup>

The main object of this provision is to provide a summary remedy for the enforcement of the liability of a surety who has furnished security or given a guarantee for any of the purposes enumerated in the section.<sup>117</sup> It dispenses with the necessity to file a separate suit by the party for whose benefit the security has been furnished or guarantee has been given and enables him to execute the decree against a surety as if he were a party to the suit and a principal debtor.<sup>118</sup>

Where the surety is liable for the fulfilment of conditions imposed by the court, the decree can be executed against him to the extent to which he has been made personally liable under the surety bond.<sup>119</sup>

The liability of a surety is joint and several.<sup>120</sup> Hence, if the creditor seeks to enforce the surety bond against one or some of the sureties, the other surety or sureties will not be discharged.<sup>121</sup> If the decree-holder enters into a compromise with the principal debtor without making the surety a party, the latter is discharged from his liability.<sup>122</sup>

Notice to the surety is a condition precedent to the validity of the proceedings against him.<sup>123</sup> Attachment of the property without notice

116. S. 145. See also *Chouthi Prasad Gupta v. Union of India*, AIR 1967 SC 1080: (1967) 1 SCR 207.

117. *Raja Kirtyanand Singh v. Raja Prithi Chand Lal Chaudhury*, (1932-33) 60 IA 43; AIR 1933 PC 52; *SBI v. Indexport Registered*, (1992) 3 SCC 159 at p. 169.

118. *Ibid*, see also *Bank of Bihar Ltd. v. Dr. Damodar Prasad*, AIR 1969 SC 297: (1969) 1 SCR 620; *SBI v. Saksaria Sugar Mills Ltd.*, (1986) 2 SCC 145 AIR 1986 SC 868.

119. *Howrah Insurance Co. Ltd. v. Sochindra Mohan*, (1975) 2 SCC 523: AIR 1975 SC 2051.

120. S. 128, Contract Act, 1872.

121. *Sri Chand v. Jagdish Pershad*, AIR 1966 SC 1427: (1966) 3 SCR 451.

122. *Amar Chand v. Bhano*, 1995 Supp (1) SCC 550: AIR 1995 SC 871; *Raja Bahadur Dhanraj v. Raja P. Parthasarthy*, (1963) 3 SCR 921.

123. Proviso to S. 145.

is illegal.<sup>124</sup> It may be given by the decree-holder, or by the court which passed the decree or by the executing court.<sup>125</sup>

### (15) Decree against corporation: Rule 32

Where the party against whom a decree for specific performance of a contract or for injunction has been passed is a corporation, and has wilfully failed to obey the decree passed against it, the same may be executed by the attachment of its property or with the leave of the court by detention in civil prison of its directors or other officers or by both.<sup>126</sup>

### (16) Decree against firm: Rules 49-50

Where a decree has been passed against a partnership firm, it may be executed against (a) any partnership property; (b) any person who has appeared in his own name as a partner, or admitted, or held to be a partner; or (c) any person who has been individually served with a summons as a partner and has failed to appear.<sup>127</sup>

If a decree-holder wants to execute a decree against a person other than those mentioned in clauses (b) and (c) as a partner in the partnership firm, the liability of such person may be determined by the court.<sup>128</sup> Such determination operates as a decree.<sup>129</sup>

Property belonging to a partnership firm can be attached or sold in execution of a decree passed against the firm or against the partners in the firm as such.<sup>130</sup> Similarly, a decree against a firm as such will not affect any partner therein who has not been served with a summons to appear and answer.<sup>131</sup> The prime object of this provision is to afford an opportunity to such partner of disputing his liability as a partner if he desires to do so.<sup>132</sup>

The provisions of Rule 50 of Order 21 should be read with Order 30. The latter deals with the procedure in suits instituted by or against firms, while the former provides the mode of execution of decrees which have been obtained against firms in the firm name.<sup>133</sup>

124. *Sk. Rahim-ud-Din v. Murli Dhar*, AIR 1938 Lah 593, *Govinda v. Abhiram*, ILR 1958 Cut 309; *Ko Maung Gyi v. Daw Tok*, AIR 1928 Rang 249; *K.A. Mohd Sultan Sahib v. Nagoji Rao*, AIR 1931 Mad 828.

125. *Lakshmishankar v. Raghmal*, ILR (1905) 29 Bom 29; *Rahim-ud Din case*, AIR 1938 Lah 593.

126. R 32(2).

127. R 50(1). See also *Topanmal v. Kundomal*, AIR 1960 SC 388; *Gajendra Narain v. Johrimal*, AIR 1964 SC 581; 1963 Supp (2) SCR 30.

128. R 50(2). See also *Gajendra Narain v. Johrimal*, AIR 1964 SC 581.

129. R 50(3).

130. R 49(1).

131. R 50(4). See also *Ravindra Finance v. Yaanai Tobacco Co.*, AIR 1979 Mad 25.

132. *Ravindra Finance v. Yaanai Tobacco Co.*, AIR 1979 Mad 25.

133. *Gambhir Mal v. J K Jute Mills Co. Ltd.*, AIR 1963 SC 243 (1963) 2 SCR 190.

**(17) Attachment of decree: Rule 53**

Where the property to be attached is a decree either for payment of money, or for sale in enforcement of a mortgage or charge, the attachment can be effected either by the court which passed the decree, or by the executing court by issuing notice to the court which has passed the decree.<sup>134</sup> Other decrees can be executed by issuing notice to the decree-holder, prohibiting him from transferring or changing the property to be attached and also by sending a notice to the executing court to abstain from executing the decree until such notice is cancelled.<sup>135</sup>

The provision is intended to prevent the holder of the attached decree from realising and taking away the fruits of the decree and to enable the attaching creditor to come to the court which has passed the decree to apply for execution and thus to safeguard the interests of the attaching creditor also.<sup>136</sup>

**(18) Payment of coins or currency notes: Rule 56**

Where the property to be attached are coins or currency notes, the court may direct that such coins or currency notes or a part thereof sufficient to satisfy the decree, be paid to the decree-holder.<sup>137</sup>

Zamindari Compensation Bonds are not coins or currency notes.<sup>138</sup>

134. R. 53(1), (2), (3).

135. R. 53(4).

136. *Mahalingam Chettiar v. Ramanathan Chettiar*, (1939-40) 67 IA 350; AIR 1940 PC 173; *Ganeshmul Sait v. Mohd. Ismail Sahib*, AIR 1944 Mad 353; ILR 1944 Mad 960: (1944) 1 Mad LJ 446 (FB); *Arvapalli Ramrao v. Kanumariapudi Ranganayakulu*, AIR 1964 AP 1: (1963) 2 ALT 153; (1963) 2 An WR 205 (FB).

137. R. 56.

138. 1962 All NR (HC) 18.

## CHAPTER 6

## SYNOPSIS

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## 1. GENERAL

One of the modes of executing a decree is arrest and detention of the judgment-debtor in a civil prison.<sup>1</sup> The decree-holder has an option to choose a mode for executing his decree and, *normally*, a court of law in the absence of special circumstances, cannot compel him to invoke a particular mode of execution.<sup>2</sup> Sections 55 to 59 and Rules 30 to 41 deal with arrest and detention of the judgment-debtor in civil prison.

## 2. NATURE AND SCOPE

The Code enumerates various modes of execution.<sup>3</sup> One of such modes is arrest and detention of the judgment-debtor in a civil prison. The substantive provisions<sup>4</sup> deal with rights and liabilities of the decree-holder and judgment-debtor and procedural provisions lay down conditions thereof.<sup>5</sup>

1. S 51(c).

2. See *supra*, "Mode of execution", Chap. 5.

3 For detailed discussion, see *supra*, Chap. 5.

4	Ss 55-59	5	Or 21 Rr 30-41
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### 3. WHEN ARREST AND DETENTION MAY BE ORDERED?

Where the decree is for payment of money, it can be executed by arrest and detention of the judgment-debtor.<sup>6</sup> Likewise, in case of a decree for specific performance of a contract or for injunction, a judgment-debtor can be arrested and detained.<sup>7</sup> Again, where a decree is against a Corporation, it can be executed with the leave of the court by detention in civil prison of its directors or other officers.<sup>8</sup>

### 4. WHO CANNOT BE ARRESTED?: SECTIONS 56, 58, 135, 135-A

The following classes of persons cannot be arrested or detained in civil prison:

- (i) a woman;<sup>9</sup>
- (ii) judicial officers, while going to, presiding in, or returning from their courts;<sup>10</sup>
- (iii) the parties, their pleaders, *mukhtars*, revenue agents and recognised agents and their witnesses acting in obedience to a summons, while going to, or attending or returning from the court;<sup>11</sup>
- (iv) members of legislative bodies;<sup>12</sup>
- (v) any person or class of persons, whose arrest, according to the State Government, might be attended with danger or inconvenience to the public;<sup>13</sup>
- (vi) a judgment-debtor, where the decretal amount does not exceed rupees two thousand.<sup>14</sup>

### 5. PROCEDURE

A judgment-debtor may be arrested at any time and on any day in execution of a decree. After his arrest, he must be brought before the court as soon as practicable. For the purpose of making arrest, no dwelling house may be entered after sunset or before sunrise. Further, no outer door of a dwelling house may be broken open unless such dwelling house is in the occupancy of the judgment-debtor and he refuses or prevents access thereto.<sup>15</sup>

Again, where the room is in the actual occupancy of a *pardanashin* woman who is not the judgment-debtor, reasonable time and facility should be given to her to withdraw therefrom.<sup>16</sup>

6. R. 30.

9. S. 56.

12. S. 135-A.

15. S. 55.

7. R. 32.

10. S. 135(1).

13. S. 55(2).

16. *Ibid.*

8. R. 32.

11. S. 135(2).

14. S. 58(1-A).

No order of detention of the judgment-debtor shall be made where the decretal amount does not exceed rupees two thousand.<sup>17</sup> No judgment-debtor may be arrested unless and until the decree-holder pays into court the subsistence allowance as fixed by the court.<sup>18</sup>

Where the judgment-debtor pays the decretal amount and costs of arrest to the officer, he should be released at once.<sup>19</sup>

In an application for the arrest and detention of the judgment-debtor, the decree-holder must state or must file an affidavit stating the grounds on which arrest is sought.<sup>20</sup> The burden is very heavy on the decree-holder to prove that the circumstances specified in the Proviso to Section 51 exist.<sup>21</sup>

The court must record reasons for the committal of the judgment-debtor to civil prison. In absence of reasons, the order is liable to be set aside.<sup>22</sup> Again, a decree for money cannot be executed by arrest and detention where the judgment-debtor is a woman,<sup>23</sup> or a minor, or a legal representative of a deceased judgment-debtor.<sup>24</sup>

## 6. NOTICE: ORDER 21 RULES 37, 40

Where the decree is for payment of money and the application is made for arrest and detention of the judgment-debtor, the court shall, instead of issuing a warrant for arrest, issue a notice calling upon the judgment-debtor to appear and show cause why he should not be committed to civil prison in execution of the decree.<sup>25</sup> The purpose of issuing notice is to afford protection to honest debtors incapable of paying dues for reasons beyond their control.<sup>26</sup>

The provision for issuing notice and affording opportunity to the judgment-debtor to show cause recognizes a rule of natural justice that no person should be condemned unheard.<sup>27</sup> It has an impact on human dignity. An order of arrest or detention without issuing notice or affording an opportunity to show cause is bad in law.<sup>28</sup>

17. S. 58(1-A).

18. R 39.

19. See *infra*, "Release of judgment-debtor".

20. R. 11-A.

21. *I.K. Merchants Ltd. v. Indra Prakash*, AIR 1973 Cal 306 at p. 314.

22. *Ibid*, see also *P.G. Ranganatha v. Mayavaram Financial Corpn.*, AIR 1974 Mad 1

23. S. 56.

24. Ss 50, 52

25. R 37(1)

26. *Jogendra Missir v. Ramnandan Singh*, AIR 1968 Pat 218 at pp. 221-22.

27. *Jolly George Varghese v. Bank of Cochin*, (1980) 2 SCC 360 AIR 1980 SC 470, *Ram Narayan v. State of U.P.*, (1983) 4 SCC 276. AIR 1984 SC 1213, *Mayadhar Bhoi v. Moti Dibya*, AIR 1984 Ori 162. (1984) 58 Cut LT 7 (1984) 1 Ori LR 503

28. *Ibid*, see also *Parol Abu Packer v. Pokkuyarath Sivasankara*, AIR 1952 Mad 161, *Joseph K Mathai v. Luckose Kurian*, AIR 1979 Ker 235, *P. Azeez Ahmed v. SBI*, (1995) 1 MLJ 446, *Subhash Chand v. Central Bank of India*, AIR 1999 MP 195. For detailed discussion of "natural justice", see, *Authors' Lectures on Administrative Law* (2012) Lecture VI.

The court, however, should not issue a notice mechanically. "The high value of human dignity and the worth of the human person enshrined in Article 21 read with Articles 14 and 19" must always be kept in mind.<sup>29</sup>

Where the judgment-debtor appears before the court in obedience to such notice, and if the court is satisfied that he is unable to pay the decretal amount, the court may reject the application for arrest.<sup>30</sup> On the other hand, where the judgment-debtor appears but fails to show cause to the satisfaction of the court against the arrest and detention, the court may, subject to the provisions of the Code, make an order of detention.<sup>31</sup>

The primary object of Rule 40 read with Rule 37 of Order 21 and Section 51 of the Code is to protect honest but indigent and poor judgment-debtors, who have no sufficient means to pay decretal dues.

Where the judgment-debtor does not appear in obedience to the notice, the court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.<sup>32</sup>

Where a money decree has remained unsatisfied for a period of thirty days, the court may, on the application of the decree-holder, require the judgment-debtor to make an affidavit stating the particulars of his assets. The person disobeying the order may be detained up to three months.<sup>33</sup>

## 7. OPPORTUNITY TO JUDGMENT-DEBTOR OF SATISFYING DECREE

Proviso to sub-rule (3) of Rule 40 affords judgment-debtor an opportunity of satisfying the decree.

## 8. POWER AND DUTY OF COURT

The provision relating to arrest and detention of the judgment-debtor protects and safeguards the interests of the decree-holder.<sup>34</sup> If the judgment-debtor has means to pay and still he refuses or neglects to honour

29. *Jolly George Varghese v. Bank of Cochin*, (1980) 2 SCC 360; AIR 1980 SC 470; *Mayadhar Bhoi v. Moti Dibya*, AIR 1984 Ori 162; *Xavier v. Canara Bank Ltd.*, 1969 KLT 927.

30. R. 40(1), (3); see also *Jolly George Varghese v. Bank of Cochin*, (1980) 2 SCC 360.

31. R. 40(3). 32. Rr. 37(2), 38. 33. R. 41(2), (3).

34. *Amulya Chandra v. Pashupati Nath*, AIR 1951 Cal 48 (FB); *T. Kunhiraman v. Pootheri Illath Madhavan*, AIR 1957 Mad 761; *Ch. Harpal Singh v. Lala Hira Lal*, AIR 1955 All 402; *Kesava Pillai v. Ouseph Joseph*, AIR 1977 Ker 27; ILR (1976) 2 Ker 92; 1976 Ker LT 433; *K.N. Gangappa v. A.M. Subramanya*, AIR 1988 Mad 182; *Ellis Stella Beaumont v. English Motor Car Co.*, AIR 1938 Cal 444 (2).

his obligations, he can be sent to civil prison.<sup>35</sup> Mere omission to pay, however, cannot result in arrest or detention of the judgment-debtor.<sup>36</sup> Before ordering detention, the court must be satisfied that there was an element of *mala fide* or bad faith, "not mere omission to pay but an attitude of refusal on demand verging on disowning of the obligation under the decree".

The above principles have been succinctly and appropriately explained by Krishna Iyer, J. in *Jolly George Varghese v. Bank of Cochin*<sup>37</sup>, in the following words:

"The simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or recusant disposition in the past or, alternatively, current means to pay the decree or a substantial part of it. The provision emphasises the need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligation under the decree. Here considerations of the debtor's other pressing needs and straitened circumstances will play prominently. We would have, by this construction, sauced law with justice, harmonised Section 51 with the Covenant and the Constitution."<sup>38</sup>

(emphasis supplied)

His Lordships ultimately propounded:

"It is too obvious to need elaboration that to cast a person in prison because of his poverty and consequent inability to meet his contractual liability is appalling. To be poor, in this land of *daridra narayana*, is no crime and to recover debts by the procedure of putting one in prison is too flagrantly violative of Article 21 unless there is proof of the minimal fairness of his wilful failure to pay in spite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness. Unreasonableness and unfairness in such a procedure is inferable from Article 11 of the covenant. But this is precisely the interpretation we have put on the proviso to Section 51, CPC and the lethal blow of Article 21 cannot strike down the provision, as now interpreted "<sup>39</sup>

## 9. RECORDING OF REASONS

The court is required to record reasons for its satisfaction for detention of the judgment-debtor. Recording of reasons is mandatory. Omission to record reasons by the court for its satisfaction amounts to ignoring a

35. *Ibid*, see also *Jolly George Varghese v Bank of Cochin*, (1980) 2 SCC 360 AIR 1980 SC 470 *Xavier v. Canara Bank Ltd.*, 1969 KLT 927, *Ganesa v Chellathai Ammal*, AIR 1972 AP 292, *Shyam Singh v. Collector, Distt Hamirpur*, 1993 Supp (1) SCC 693.

36. *Jolly George Varghese v Bank of Cochin*, (1980) 2 SCC 360

37. (1980) 2 SCC 360 AIR 1980 SC 470

38. *Ibid*, at p 368 (SCC) at pp 475-76 (AIR)

39. *Ibid*, at pp 367-68 (SCC) at p 475 (AIR).

material and mandatory requirement of law.<sup>40</sup> Such reasons should be recorded every time and in every proceeding in which the judgment-debtor is ordered to be detained.<sup>41</sup>

## 10. PERIOD OF DETENTION: SECTION 58

The period of detention of the judgment-debtor in civil prison shall be (a) up to three months, where the decretal amount exceeds rupees five thousand; and (b) up to six weeks, where the decretal amount exceeds rupees two thousand but does not exceed rupees five thousand.<sup>42</sup>

Where the decretal amount does not exceed rupees two thousand, no detention can be ordered.<sup>43</sup>

## 11. RELEASE OF JUDGMENT-DEBTOR: SECTIONS 58-59

A judgment-debtor may be released in the following cases:<sup>44</sup>

- (i) On the amount mentioned in the warrant being paid; or
- (ii) On the decree against him being otherwise fully satisfied; or
- (iii) On the request of the decree-holder; or
- (iv) On the omission by the decree-holder to pay subsistence allowance; (such release, however, does not discharge the judgment-debtor from his debt, but he cannot be rearrested on the same ground);<sup>45</sup>
- (v) On the ground of illness.<sup>46</sup>

## 12. RE-ARREST OF JUDGMENT-DEBTOR

Normally, a judgment-debtor once released, cannot be re-arrested in execution of the same decree.<sup>47</sup> But if the judgment-debtor is released because of a mistake of the jail authorities, he can be re-arrested.<sup>48</sup> Similarly, where the judgment-debtor could not be sent to jail due to

40. *P.G. Ranganatha v. Mayavaram Financial Corpn.*, AIR 1974 Mad 1; *K.V. Muthu v. R.S. Mani*, AIR 1956 Mad 580; *Kota Venkathasubba Rao v. Majeti Sreeramulu*, AIR 1949 Mad 470; *Londa Abbayee v. Badam Suryanarayana*, AIR 1948 Mad 9 (1); *Mayadhar Bhoi v. Moti Dibya*, AIR 1984 Ori 162; (1984) 58 Cut LT 7; (1984) 1 Ori LR 503; *B.R. Chandran v. Indian Bank*, (1988) 1 LW 9 (Mad). (1986) 1 MLJ 214.

41. *Ibid*, see also *S.K. Kuttalalingam v. S.V.N. Chinnakannu Pillai*, AIR 1952 Mad 18.

42. S. 58(1). 43. S. 58(1-A).

44. Proviso to S. 58(1); see also, Ss. 57, 59.

45. S. 58(2). 46. S. 59.

47. *M.H. Aquill v. Union Bank of India*, AIR 1985 Kant 120; ILR (1984) 2 Kant 171; *Rajendro Narain v. Chunder Mohun*, ILR (1895) 23 Cal 128.

48. *Kesar Singh v. Karam Chand*, AIR 1937 Lah 253.

non-payment of subsistence allowance by the decree-holder, his re-arrest is not unlawful.<sup>49</sup> Again, release of the judgment-debtor on the ground of illness does not debar his re-arrest. The total period of actual detention, however, cannot exceed the maximum prescribed in the Code.<sup>50</sup>

49. *Malli K Dhanalakshmi v Malli Krishnamurthi*, AIR 1951 Mad 756 (1951) 1 MLJ 515, 1951 MWN 220.

50. *Ibid*, see also *Habib-ul-Rahman v. Ramsahai*, ILR (1904) 26 All 317, *Bohuru Mal v Jagan Nath*, AIR 1933 Lah 307.

# CHAPTER 7

## Attachment of Property

### SYNOPSIS

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### 1. GENERAL

A decree may also be executed on the application of the decree-holder by attachment and sale or by sale without attachment of property. The Code recognises the right of the decree-holder to attach the property of the judgment-debtor in execution proceedings and lays down the procedure to effect attachment. Sections 60 to 64 and Rules 41 to 57 of Order 21 deal with the subject of attachment of property.

### 2. NATURE AND SCOPE

The Code enumerates properties which are liable to be attached and sold in execution of a decree.<sup>1</sup> Likewise, it also specifies properties which are

1. S. 60(1).

not liable to be attached or sold.<sup>2</sup> It also prescribes the procedure where the same property is attached in execution of decrees by more than one court.<sup>3</sup> The Code also declares that a private alienation of property after attachment is void.<sup>4</sup>

An executing court is competent to attach the property if it is situated within the local limits of the jurisdiction of the court.<sup>5</sup> The place of business of the judgment-debtor is not material.<sup>6</sup>

The provisions of the Code, however, do not affect any special or local law.<sup>7</sup> Attachment and sale under any other statute, therefore, can be made and the judgment-debtor cannot claim benefit under the Code.<sup>8</sup>

### 3. OBJECT

The primary object of attachment of property is to give notice to the judgment-debtor not to alienate the property to anyone as also to the general public not to purchase or in any other manner deal with the property of the judgment-debtor attached in execution proceedings.<sup>9</sup> At the same time, it protects a judgment-debtor by granting exemption to certain properties from attachment and sale.<sup>10</sup>

Keeping in mind the intention underlying the provisions, the words "attachment" and "sale" are to be read disjunctively and not conjunctively.<sup>11</sup> Hence, attachment of property is not a condition precedent<sup>12</sup> and sale of property without attachment is merely an irregularity and does not vitiate the sale.<sup>13</sup>

2. Proviso to S. 60(1). For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. I at pp. 889-960.

3. S. 63. 4. S. 64.

5. *M A.A. Raoof v. K.G. Lakshmipathi*, AIR 1969 Mad 268; (1968) 2 Mad LJ 34.

6. *Ibid.*

7. S. 4; see also *Firm Amin Chand Hakam Chand v Noshah Begum*, AIR 1954 Punj 235; *State of Punjab v. Dina Nath*, (1984) 1 SCC 137. AIR 1984 SC 352.

8. *State of Punjab v. Dina Nath*, (1984) 1 SCC 137; *Ramesh Himmatlal v. Harsukh Jadhavi*, (1975) 2 SCC 105; AIR 1975 SC 1470.

9. Statement of Objects and Reasons, Gazette of India, dt. 1-4-1976, Pt II, S 2, Extra. at p. 804 (8); see also *Balkrishnan Gupta v. Swadeshi Polytex Ltd.*, (1985) 2 SCC 167 at pp. 192-93; AIR 1985 SC 520 at p. 534. *Hamda Ammal v. Avadiappa Pathar*, (1991) 1 SCC 715 at p. 718, *Supreme General Films Exchange Ltd v. Brijnath Singhji*, (1975) 2 SCC 530; AIR 1975 SC 1810.

10. *Ibid.* see also *Official Receiver v Chepur China*, AIR 1960 AP 353, *Dwarika Prasad v Damodar Swarup*, AIR 1967 All 520; 1967 All LJ 139.

11. *Amulya Chandra v Pashupati Nath*, AIR 1951 Cal 48 (FB), *Nar Singh Datt v Ram Pratap*, AIR 1961 All 436.

12. *Krishnamukhlal v Bhagwan Kashidas*, AIR 1974 Guj 1; (1973) 14 Guj LR 280, *Karnataka Bank Ltd v. K. Shamanna*, AIR 1972 Mys 321, *Janki Vallabh v Moolchand*, AIR 1974 Raj 168.

13. *Haji Rahim Bux & Sons v. Firm Samiullah & Sons*, AIR 1963 All 320.

#### 4. PROPERTY WHICH CAN BE ATTACHED: SECTION 60

Section 60(1) declares which properties are liable to attachment and sale in execution of a decree, and which properties are exempt therefrom. All saleable property (movable or immovable) belonging to the judgment-debtor or over which or the portion of which he has a disposing power which he may exercise for his own benefit may be attached and sold in execution of a decree against him.<sup>14</sup> The section is not exhaustive.<sup>15</sup> Specific non-inclusion of a particular species of property under Section 60 is, therefore, not of any consequence *if it is saleable otherwise*.<sup>16</sup> (emphasis supplied)

#### 5. PROPERTY WHICH CANNOT BE ATTACHED: SECTIONS 60-61

The proviso to sub-section (1) of Section 60 declares that the properties specified therein are exempt from attachment and sale in the execution of a decree.<sup>17</sup> The list enumerates certain properties such as necessary wearing apparel, cooking vessels, bedding, tools of artisans, implements of husbandry, houses of agriculturists, wages, salaries, pensions and gratuities, compulsory deposits, right to future maintenance, etc. The exemptions listed in the proviso are cumulative and the judgment-debtor may claim the benefit of more than one clause if he is qualified to do so.<sup>18</sup>

There was a conflict of judicial opinion as to whether a judgment-debtor can waive the benefit conferred on him by the proviso. One view was that since it was intended for the benefit of the judgment-debtor he

14. *Srimant Appasaheb Tuljaram v. Balchandra Vithalrao*, AIR 1961 SC 589; (1961) 2 SCR 163; *State of Punjab v. Dina Nath*, (1984) 1 SCC 137; AIR 1984 SC 352; *Balkrishnan Gupta v. Swadeshi Polytex Ltd.*, (1985) 2 SCC 167 at pp. 192-93; AIR 1985 SC 520 at p. 534.

15. *Ramesh Himmattal v. Harsukh Jadhavji*, (1975) 2 SCC 105; AIR 1975 SC 1470.

16. *Ibid*, at p. 114 (SCC): at p. 1477 (AIR). For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. I at pp. 889-960.

17. Proviso to S. 60(1); see also, S. 61; see further *supra*, *State of Punjab v. Dina Nath*; *Calcutta Dock Labour Board v. Sandhya Mitra*, (1985) 2 SCC 1 at p. 4; AIR 1985 SC 996 at pp. 997-98; *Union of India v. Jyoti Chit Fund and Finance*, (1976) 3 SCC 607; AIR 1976 SC 1163; see also, Law Commission's Fifty-fourth Report at p. 4.

18. *Municipal Corpn. of Rangoon v. Ram Behari*, AIR 1939 Rang 432; *Ram Singh v. Bherulal*, AIR 1982 MP 95. *Radhey Shyam v. Punjab National Bank*, (2009) 1 SCC 376. For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. I at pp. 889-960.

can waive it.<sup>19</sup> Another view was that it was based on public policy and, therefore, cannot be waived by him.<sup>20</sup>

By the Amendment Act of 1976, new sub-section (1-A) has been inserted on the recommendation of the Law Commission.<sup>21</sup> This new sub-section now specifically provides that any agreement to waive the benefit of any exemption under Section 60 shall be void. Section 61 empowers the State Government to exempt agricultural produce from attachment or sale. This provision is intended to enable an agriculturist to continue agricultural operations even after execution of a decree.<sup>22</sup>

## 6. MODES OF ATTACHMENT: SECTION 62; ORDER 21 RULES 43-54

Rules 43 to 54 of Order 21 lay down the procedure for attachment of different types of movable and immovable properties. These provisions may be explained by the following chart:

<i>Type of Property</i>	<i>Mode of Attachment</i>
1. Movable property (other than agricultural produce) in possession of the judgment-debtor;	By actual seizure thereof. But if such property is perishable, or the expense of keeping it is likely to exceed its value, it may be sold. <sup>a</sup>
2. Movable property consisting of livestock, agricultural implements or other articles which cannot conveniently be attached;	By leaving the same in the custody of a respectable person as the "custodian". <sup>b</sup>
3. Movable property not in possession of the judgment-debtor;	By an order prohibiting the person in possession thereof from giving it to the judgment-debtor. <sup>c</sup>
4. Negotiable instrument neither deposited in a court nor in the custody of a public officer;	By actual seizure and bringing it into court. <sup>d</sup>
5. Debt not secured by a negotiable instrument;	By an order prohibiting the creditor from recovering the debt and the debtor from paying the debt. <sup>e</sup>

19. *Rajindar Kumar v. Chetan Lal*, AIR 1940 Lah 65; *Uzir Biswas v. Haradeb Das*, AIR 1920 Cal 424; *Bala Prasad v. Ajodhya Prasad*, AIR 1952 Pat 278; *Mahadeo Agrahri v. Dhaunkal Mal*, AIR 1946 All 432; *K. Santha Kumari v. K. Suseela Devi*, AIR 1969 AP 355; *Ganpatrao Nagoba v. A. V. Zinzarde*, AIR 1948 Nag 392; *Chedalavada Venkayya v. Payadi Tatayya*, AIR 1945 Mad 276.

20. *Union of India v. Jyoti Chit Fund and Finance*, (1976) 3 SCC 607; AIR 1976 SC 1163. *M. and S.M. Railway v. Rupchand Jitaji*, AIR 1950 Bom 155, *Ram Naresh v. Ganesh Mistri*, AIR 1952 All 680; *Dupagunta Subramaniam v. Gouinda Petar Satyanadham*, AIR 1942 Mad 391, *Indersy v. Parasuram*, 1961 Raj LW 261, *Gowranna v. Basavana Gowd*, AIR 1975 Kant 84, *Prem Nath v. Nand Lal*, AIR 1982 All 489, *Duggirala Balarama v. Arokapudi Jagannadha*, AIR 1983 AP 136.

21. Law Commission's Fifty-fourth Report at p. 50.

22. *Azmat Ali v. Raj Ditta*, 1969 All LJ 1045, *Vasu v. Narayanan*, AIR 1962 Ker 261, *Narsingh v. Kamandas*, AIR 1980 MP 37 (FB).

<i>Type of Property</i>	<i>Mode of Attachment</i>
6. Share in the capital of a corporation;	By an order prohibiting the person in whose name the share stands from transferring it or receiving dividend thereon. <sup>f</sup>
7. Share or interest in movable property belonging to the judgment-debtor and another as co-owners;	By a notice to the judgment-debtor prohibiting him from transferring or charging it. <sup>g</sup>
8. Salary or allowance of a public servant or a private employee;	By an order that the amount shall (subject to the provisions of Section 60), be withheld from such salary or allowances either in one payment or by monthly instalments. <sup>h</sup>
9. Partnership property;	By making an order: (a) charging the interest of the partner in the partnership property; (b) appointing a receiver of the share of the partner in profits; (c) directing accounts and inquiries; and (d) ordering sale of such interests. <sup>i</sup>
10. Property in custody of court or public officer;	By notice to such court or officer, requesting that such property, and any interest or dividend thereon, may be held subject to the order of the court. <sup>j</sup>
11. (i) Decree for payment of money or sale in enforcement of a mortgage or charge— (a) passed by the court executing the decree; (b) passed by another court; (ii) Decree other than that mentioned above;	By an order of such court. <sup>k</sup> By issuing a notice to such court requesting it to stay execution thereof. <sup>l</sup> By issuing a notice (a) to the decree-holder prohibiting him from transferring or charging it in any way; (b) to the executing court from executing it until such notice is cancelled. <sup>m</sup>
12. Agricultural produce;	By (i) affixing a copy of the warrant (a) in case of growing crop, on land on which such crop has grown; and (b) in case of ready crop, the place at which it is lying; and (ii) also by affixing a copy on the house in which the judgment-debtor ordinarily resides, carries on business or personally works for gain, or last resided, carried on business or personally worked for gain. <sup>n</sup> Where application is for the attachment of growing crop, it shall specify the time at which is likely to be harvested. <sup>o</sup> (The object is to enable the court to make necessary arrangements for the custody of the crop.) <sup>p</sup>
13. Immovable property;	By an order prohibiting the judgment-debtor from transferring or charging it in any manner and all persons from taking any benefit from such transfer or charge. <sup>q</sup>

<sup>a</sup> Rr. 42, 43; see also *Teeka v State of U.P.*, AIR 1961 SC 803. (1962) 1 SCR 75.

<sup>b</sup> R. 43-A.

<sup>c</sup> R. 46(1)(c).

<sup>d</sup> R. 51.

<sup>e</sup> R. 46(1)(a).

<sup>f</sup> R. 46(1)(b).

<sup>g</sup> R. 47.

<sup>h</sup> Rr. 47 and 48-A.

<sup>i</sup> R. 49.

<sup>j</sup> R. 52; see also *Kanhaiyalal v Dr. D.R. Banaji*, AIR 1958 SC 725: 1959 SCR 333.

<sup>k</sup> R. 53(1)(a).

<sup>l</sup> R. 53(1)(b).

<sup>m</sup> R. 53(4).

<sup>n</sup> R. 44.

<sup>o</sup> R. 45.

<sup>p</sup> *Mahabir Sah v Emperor*, AIR 1941 Pat 136.

<sup>q</sup> R. 54; see also *M. Marathachalam v Padmavathi Ammal*, (1971) 3 SCC 878; *Desh Bandhu Gupta v. N.L. Anand*, (1994) 1 SCC 131; *Satyanarayana Bajoria v. Ramalingam Tibrewal*, AIR 1952 Mad 86 (FB).

No dwelling house may be entered after sunset and before sunrise. No outer door of it may be broken open, unless it is in the occupancy of the judgment-debtor and he refuses or prevents access thereto. Where a dwelling house is in actual occupation of a *pardanashin* woman, reasonable time and facility must be given to her to withdraw.<sup>23</sup> Section 63 prescribes procedure to be followed in case the property is attached in execution of decrees by several courts.

## 7. PRECEPT: SECTION 46

### (a) Meaning

"Precept" means "a command", "an order", "a writ" or "a warrant".<sup>24</sup>

### (b) Nature and scope

A precept is an order or direction given by the court which passed the decree to a court which would be competent to execute the decree to attach any property belonging to the judgment-debtor.

Section 46 provides that the court which passed a decree may, upon an application by the decree-holder, issue a precept to that court within whose jurisdiction the property of the judgment-debtor is lying to attach any property specified in the precept.<sup>25</sup>

### (c) Object

The principal object of attachment by precept is to enable the decree-holder to obtain an interim attachment of the property of the judgment-debtor situate within the jurisdiction of another court where it is apprehended that the decree-holder may otherwise be deprived of the fruits of the decree.<sup>26</sup>

Thus, a precept seeks to prevent alienation of property of the judgment-debtor not located within the jurisdiction of the court which passed the decree so that interest of the decree-holder is safeguarded and protected

23 S 62

24 *Concise Oxford English Dictionary* (2002) at p 1125

25 S 46(1)

26 *Gurdial Singh v. Khazan Chand*, AIR 1936 Lah 486; *Kapoorchand v. Renati Prasad* AIR 1956 MB 208; *Radheshyam v. Devendra*, AIR 1952 Pat 213; ILR 1952 Mad 56 (FB); *Karri Venkata Reddi v. Central Bank of India* AIR 1990 AP 81.

### (d) Limitations

An order of precept is merely a step taken to facilitate execution, and not an order transferring a decree for execution.<sup>27</sup> It is for this reason that the effect of the attachment in pursuance of the precept is, as a general rule, limited to two months unless the case is covered by the proviso.<sup>28</sup> An order of permanent attachment is, therefore, illegal.<sup>29</sup>

Moreover, this section applies to matters which arise after a decree has been passed. Hence, it cannot be invoked in aid of an application for attachment before judgment under Order 38 Rule 5.<sup>30</sup> Again, no attachment can be effected under this section where the property is situate outside India.<sup>31</sup>

## 8. GARNISHEE ORDER: RULES 46-A-46-I

### (a) General

Rules 46-A-46-I of Order 21, as inserted by the Code of Civil Procedure (Amendment) Act, 1976 lay down procedure in garnishee cases.

Garnishee proceeding is a proceeding by which the decree-holder seeks to reach money or property of the judgment-debtor in the hands of a third party (debtor of judgment-debtor). By this process, an executing court may order a third party to pay to the judgment-creditor (decree-holder) the debt from him to the judgment-debtor. The payment made by the garnishee pursuant to the order passed by the executing court is a valid discharge to him against his decree-holder.

### (b) Meaning

"Garnishee" means a judgment-debtor's debtor. He is a person who is liable to pay a debt to a judgment-debtor or to deliver any movable property to him. "Garnisher" (Garnishor) is a judgment-creditor (decree-holder) who initiates garnishee proceedings to reach judgment-debtors money or property held or possessed by third party (garnishee). "Garnishment" is a proceeding by which the decree-holder seeks to get the property of the judgment-debtor. "Garnishee proceeding" is a judicial proceeding in which a judgment-creditor (decree-holder) prays to executing court to direct third party who is a debtor of the judgment-debtor to pay the amount to the garnisher (decree-holder). "Garnishee order" is an order passed by a court ordering a garnishee not to pay

27. *Rai Kissenji v. Sri Kissen*, AIR 1940 Cal 26; *Champalal v. Mohanlal*, AIR 1959 MP 397; *Rampalli Ramachandrudu v. Bakraj Gulabchand*, AIR 1952 Mad 826.

28. Proviso to S. 46(2). *Hindustan Bicycles v. Nath Bank*, AIR 1957 AP 209.

29. *Gurdiyal Singh case*, AIR 1936 Lah 486.

30. *Chimandas v. Mahadevappa Firm*, AIR 1961 AP 417.

31. *Mela Mal v. Bishan Das*, AIR 1931 Lah 723.



**(f) Notice**

Rule 46-A requires a notice to be issued to a garnishee before a garnishee order is passed against him. If such notice is not issued and opportunity of hearing is not afforded before passing an order, the order would be null and void. In the eye of the law, there is no existence of such an order and any step taken pursuant to or in enforcement of such an order would also be void.<sup>36</sup>

**(g) Effect of payment**

The payment made by the garnishee into the court pursuant to such notice shall be treated as a valid discharge to him as against the judgment-debtor. The Court may direct that such amount may be paid to the decree-holder towards the satisfaction of the decree and costs of the execution.<sup>37</sup>

**(h) Failure to pay**

Where neither the garnishee makes the payment into the court, as ordered, nor appears and shows any cause in answer to the notice, the court may order the garnishee to comply with such notice as if such order were a decree against him.<sup>38</sup>

**(i) Costs**

The costs of garnishee proceedings are at the discretion of the court.<sup>39</sup>

**(j) Appeal**

Orders passed in garnishee proceedings are appealable as "decrees".<sup>40</sup>

**(k) Wrongful garnishment**

A wrongful garnishment may give rise to an action for damages.<sup>41</sup>

## 9. DETERMINATION OF ATTACHMENT: RULES 55-58

An attachment under the Code will be determined in the following circumstances:

- (i) Where the decretal amount is paid or the decree is otherwise satisfied;<sup>42</sup>
- (ii) Where the decree is reversed, or is set aside;<sup>43</sup>
- (iii) Where the court upholds objection against the attachment and makes an order releasing the property;<sup>44</sup>
- (iv) Where after the attachment the application for execution is dismissed;<sup>45</sup>
- (v) Where the attaching creditor withdraws attachment;<sup>46</sup>
- (vi) Where the decree-holder fails to do what he is bound to do under the decree;<sup>47</sup>
- (vii) Where the suit of the plaintiff is dismissed;<sup>48</sup>
- (viii) Where the attachment is ordered before judgment and the defendant furnishes necessary security;<sup>49</sup>
- (ix) Where there is agreement or compromise between the parties;<sup>50</sup>
- (x) Where the attaching creditor abandons the attachment.<sup>51</sup>

## 10. PRIVATE ALIENATION OF PROPERTY AFTER ATTACHMENT: SECTION 64

### (a) Nature and scope

Section 64 (1) enacts that a private alienation of property after attachment is void as against claims enforceable under the attachment.<sup>52</sup> The alienation, however, is not absolutely void against all the world, but is void against the claims enforceable under the attachment

Sub-section (2) of Section 64, as inserted by the Code of Civil Procedure (Amendment) Act, 2002 clarifies that the section will not

42. R 55 (a), (b)

43. R 55(c)

44. R 58(1)

45. R. 57; see also *Nancy John v. Prabhati Lal*, (1987) 4 SCC 78 AIR 1987 SC 2061.

46. *Behari Lal v. Saral Kumar*, AIR 1965 Cal 163, *Pritam Chand v. Rulda Maingal*, AIR 1960 Punj 4; *Chamiyappa Tharagan v. M S Rama Iyer*, AIR 1921 Mad 30

47. *Baba Punjabi Gujar v. Kisan Narayan Wani*, AIR 1938 Bom 18, *Datar Singh v. Khan Chand*, AIR 1934 Lah 697, *Mohd. Gaffar Baig v. Mohd. Abdul Khaleel*, AIR 1957 AP 991

48. Or 38 R 5.

49. Or 38 R. 9

50. *Behari Lal v. Saral Kumar*, AIR 1965 Cal 163, *Parma Nand v. Tharu Lal*, AIR 1937 Lah 169.

51. *Ramkrishna Dass v. Surfunnissa Begum*, ILR (1880) 6 Cal 129 (PC); *Peetiyakkal Vatakkal Purayil v. Marakkarakath Ahammad*, AIR 1915 Mad 61 25 IC 906

52. *Marathachalam Pillai v. Padmavathi Ammal*, (1971) 3 SCC 878 *Balkrishnan Gupta v. Swadeshi Polytext Ltd.*, (1985) 2 SCC 167 at pp. 192-93 AIR 1985 SC 520 at p. 534. (Cm) *Prakash v. Ganga Sahai*, (1987) 3 SCC 553 AIR 1988 SC 108 *Nancy John v. Prabhati Lal*, *supra*

apply to a transfer of property in pursuance of a contract entered into and registered before the attachment.<sup>53</sup>

### (b) Object

The primary object of this provision is to prevent fraud on decree-holders and to keep intact the rights of attaching creditors and of those creditors who have obtained decrees and are entitled to satisfaction out of the assets of the judgment-debtor.<sup>54</sup> It is, therefore, immaterial for the application of Section 64 whether the decree had or had not been passed before the time when the transfer was effected or whether the transferee acted in good faith or not.<sup>55</sup> But if the sale deed was executed prior to attachment before judgment, it can be registered subsequently and will prevail over attachment.<sup>56</sup>

### (c) Interpretation

The provision interferes with the rights of the owner in alienating his property and, hence, it should be construed strictly.<sup>57</sup> Again, as the provision is for the benefit of attaching creditor, he can waive the benefit.<sup>58</sup>

### (d) Private transfer: Meaning

A "private transfer" means a voluntary transfer such as sale, mortgage, lease, gift, etc. and not a transfer by operation of law such as sale under a decree passed by a competent court.<sup>59</sup> Finally, a private transfer in contravention of Section 64 is not wholly void against all the world but is void only against claims enforceable under the attachment and only to the extent necessary to meet those claims.<sup>60</sup>

53. S. 64(2); see also, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. I at pp. 972-89.

54. *Official Receiver v. Chandra Shekhar*, AIR 1977 All 77 at pp. 78-79; *Nana Rao v. Arunachalam*, AIR 1940 Mad 385 (FB), *Kali Kumar v. Kali Prasanna*, AIR 1917 Cal 561.

55. *Ibid*, see also *Supreme General Films Exchange Ltd. v. Brijnath Singhji*, (1975) 2 SCC 530; AIR 1975 SC 1810; *Shivlingappa Bin v. Chanbasappa Bin*, ILR (1906) 30 Bom 337.

56. *Hamda Ammal v. Avadiappa Pathar*, (1991) 1 SCC 715; *Vannarakkal Kallalathil v. Chandramaath Balakrishnan*, (1990) 3 SCC 291.

57. *Manuswami v. Pandurang*, AIR 1978 AP 47; *Supreme General Films Exchange Ltd. v. Brijnath Singhji*, (1975) 2 SCC 530; AIR 1975 SC 1810.

58. *Radha Mohan v. Wahidan*, AIR 1934 Pat 685; *Subbayya v. Kandi Subba Reddi*, AIR 1927 Mad 648.

59. *Supreme General Films Exchange Ltd. v. Brijnath Singhji*, (1975) 2 SCC 530.

60. *Balkrishnan Gupta v. Swadeshi Polytext Ltd.*, (1985) 2 SCC 167 at pp. 192-93 AIR 1985 SC 520 at p. 534; *Nancy John v. Prabhati Lal*, (1987) 4 SCC 78, *Rushi Mahakur v. Ditya Shankar*, AIR 1988 Ori 145.

## CHAPTER 8

# Questions to be Determined by Executing Court

### SYNOPSIS

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## 1. GENERAL

Section 47 is one of the most important provisions in the Code relating to execution. It applies only to matters arising subsequent to the passing of a decree; and deals with objections to execution, discharge and satisfaction of a decree. It lays down the principle that matters relating to the execution, discharge or satisfaction of a decree arising between the parties, or their representatives, should be determined in execution proceedings and not by a separate suit.<sup>1</sup>

## 2. SECTION 47

Section 47 of the Code reads as under:

**"Questions to be determined by the court executing decree.—**(1) All questions arising between the parties to the suit in which the decree was

1 S. 47 see also *Merla Ramanna v Nallaparaju*, AIR 1956 SC 87 at p. 97 (1955) 2 SCR 238; *M. P. Shreevastava v Veena*, AIR 1967 SC 1193 at p. 1195 (1967) 1 SCR 147; *Nandarami Mazumdar v Indian Airlines*, (1983) 4 SCC 461; AIR 1983 SC 1201; *Desh Bandhu Gupta v N. L. Anand* (1994) 1 SCC 131; 1993 AIR SCW 3458.

passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

(2) \* \* \*

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

*Explanation I.*—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

*Explanation II.*—(a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section."

### 3. OBJECT

The underlying object of this provision is to provide cheap and expeditious remedy for determination of certain questions in execution proceedings without recourse to a separate suit and to prevent needless and unnecessary litigation.<sup>2</sup> Section 47, therefore, must be construed liberally.<sup>3</sup>

Like Section 11, Section 47 has been enacted with a view to enable parties to obtain adjudication of questions relating to execution without unnecessary expenses or delay which a fresh trial might entail.<sup>4</sup> The rule of *res judicata* deals with the finality of a decision of a court on matters actually or constructively in issue before it and bars a fresh trial of any kind of such questions in subsequent proceedings between the parties; while Section 47 deals with the enforcement of such decisions and enacts that the questions specified in the section shall be tried in execution and not by a separate suit. In other words, when there is an

2. *Prosunno Commar v. Kasi Das*, (1895) 19 Cal 683 at p. 689 (PC); (1891-92) 19 IA 166; *Amir Chand v. Bakshi*, (1916) 30 MLJ 238 (PC); *Chowdhry Wahid Ali v. Jumaee*, (1873) 11 Beng LR 149 at p. 155 (PC); 18 Suth WR 185; *Ramchandra Spg. & Wvg Mills v. Bijli Cotton Mills Ltd.*, AIR 1967 SC 1344; (1967) 2 SCR 301; *Harnandrai v. Debidutt*, (1973) 2 SCC 467 AIR 1973 SC 2423, *Gangabai Gopaldas Mohata v. Fulchand*, (1997) 10 SCC 387; AIR 1997 SC 1812.

3. *Harnandrai v. Debidutt*, (1973) 2 SCC 467; AIR 1973 SC 2423; *Desh Bandhu Gupta v. N L. Anand*, (1994) 1 SCC 131; *Ramchandra Spg. & Wvg Mills v. Bijli Cotton Mills Ltd.*, AIR 1967 SC 1344; (1967) 2 SCR 301.

4. *Prosunno Commar v. Kasi Das*, ILR (1895) 19 Cal 683, *Kayem Biswas v. Bahadur Khan*, AIR 1925 Cal 1258.

executable decree, no suit lies for the enforcement thereof, or for the determination of the questions specified in Section 47.<sup>5</sup>

#### 4. NATURE AND SCOPE

The scope of Section 47 is very wide. Exclusive jurisdiction has been conferred on the executing court in respect of all matters relating to execution, discharge or satisfaction of a decree arising between the parties or their representatives. Once the suit is decreed, this section requires that the executing court alone should determine all questions in execution proceedings and filing of a separate suit is barred.<sup>6</sup>

Since Section 47 embraces all matters connected with the execution of a decree between the parties or their representatives, and covers all questions relating to the execution, discharge or satisfaction of the decree, it should be liberally construed so as to empower the court to determine all such questions, unless they clearly fall outside the scope and purview of it.<sup>7</sup> It does not matter whether such questions arise before or after the decree has been executed.<sup>8</sup>

The provision is not *ultra vires* Article 14 of the Constitution.<sup>9</sup>

#### 5. CONDITIONS

In order that this section may apply, the following conditions must be satisfied<sup>10</sup>:

- (i) The question must be one arising between the parties to the suit in which the decree is passed, or their representatives; and

5. *Sasi Sekhreshwar v. Lalit Mohan*, AIR 1925 PC 34; *Bommadevara Naganna v. Ravi Venkatappayya*, (1922-23) 50 IA 301; AIR 1923 PC 167, *Abdul Hamid v. Dhanu Dusadh*, AIR 1938 Pat 41; *M.P. Shreevastava v. Veena*, AIR 1967 SC 1193; (1967) 1 SCR 147
6. *Jugalkishore v. Raw Cotton Co. Ltd.*, AIR 1955 SC 376; 1955 SCR 1369. *M P Shreevastava v. Veena*, AIR 1967 SC 1193; (1967) 1 SCR 147; *Desh Bandhu Gupta v. N L. Anand*, (1994) 1 SCC 131.
7. *Prosunno Commar v. Kasi Das*, (1895) 19 Cal 683 (PC), *Ganapathy Mudaliar v. Krishnamachariar*, (1917-18) 45 IA 54 AIR 1917 PC 121, *Harnandrai v. Debidutt*, (1973) 2 SCC 467; AIR 1973 SC 2423.
8. *Merla Ramanna v. Nallaparaju*, AIR 1956 SC 87; *Imdad Ali v. Jagan Lal*, ILR (1895) 17 All 478; *Gopal Rai v. Rambhanjan Rai*, AIR 1922 Pat 166, *Sansar Chand v. Shyam Lal*, AIR 1957 Punj 307.
9. *Ganga Bai v. Vijay Kumar*, (1974) 2 SCC 393. AIR 1974 SC 1126, *Rami Manprasad v. Gopichand*, (1973) 4 SCC 89 AIR 1973 SC 566, *Anant Mills Co. Ltd. v. State of Gujarat*, (1975) 2 SCC 175 AIR 1975 SC 1234, *Vijay Prakash v. Collector of Customs*, (1988) 4 SCC 402 AIR 1988 SC 2010, *Masomat Narmada Devi v. Ram Nandan Singh*, AIR 1987 Pat 33 (FB)
10. *Merla Ramanna v. Nallaparaju*, AIR 1956 SC 87 (1955) 2 SCR 938 *Arokiasamy v. Marthal Margaret*, AIR 1982 Mad 93, *Hamidganj Ammal v. Ammasanib Ammal*, AIR 1941 Mad 898 (1941) 2 MLJ 622 (FB)

- (ii) It must relate to the execution, discharge or satisfaction of the decree.

Both the above conditions must be satisfied cumulatively.<sup>11</sup>

### (1) Parties or their representatives

The first condition for the applicability of Section 47 is that the question to be determined by the court must be one arising between the parties to the suit or their representatives.

The expression "*parties to the suit*" does not mean *de facto* parties on record, or parties on opposite sides as plaintiff and defendant, but means parties opposing each other.<sup>12</sup> Thus, in a partition suit, parties who are co-defendants are often arrayed against each other; and therefore, a question between them relating to execution falls within Section 47.<sup>13</sup> On the other hand, questions arising between the parties who are not opposed to each other or between a party and a stranger do not fall within this provision.<sup>14</sup> A purchaser of a property at a sale in execution of a decree, though a stranger to a suit, is deemed to be a party to the suit in which the decree has been passed.<sup>15</sup> Whether a person is or is not a party to the suit should be decided not on the basis whether he is a party to the decree but whether he is a party to the suit in which the decree is passed.<sup>16</sup>

The term "*representative*" in Section 47 includes not only "*legal representatives*" in the sense of heirs, executors or administrators as defined in Section 50 of the Code, but also a "*representative-in-interest*", i.e. any transferee of interest of the decree-holder or the judgment-debtor who is bound by the decree.<sup>17</sup> Whether a person is a "*representative*"

11. *Arokiasamy v. Martial Margaret*, AIR 1982 Mad 93; *Merla Ramanna v. Nallaparaju*, AIR 1956 SC 87.
12. *Shriram Nathuji v. Coop Society Chandur No. 55*, AIR 1949 Nag 398; *Bathai Bagyalakshmi Ammal v. Thoppai Bappu Aiyar*, AIR 1946 Mad 90; *Sundar Das v. Bishan Das*, AIR 1936 Lah 116; *Amiran v. Kaniz Aisha*, AIR 1934 Pat 627; *Mohd. Akhtar Ali v. Badrudin*, AIR 1973 Pat 187; *Gopi Narain Khanna v. Babu Bansidhar*, (1904-05) 32 IA 123 (PC).
13. *Ibid*, see also *Syed Saeed Ahmed v. Syed Raza Hussain*, AIR 1933 All 57; *Gopi Narain Khanna v. Babu Bansidhar*, (1904-05) 32 IA 123 (PC); *Kalpada Mukerji v. Basanta Kumar*, AIR 1932 Cal 126.
14. *Bhai Ishar Das v. Govindi*, AIR 1975 Raj 45; *Krishna Pillai v. Lekshmi Amma*, AIR 1966 Ker 18; *Lakhan Sahu v. Surji Telin*, AIR 1962 Pat 341; *Jasraj Multan Chand v. Kamruddin*, AIR 1971 MP 184; *Dada v. Yesu*, AIR 1923 Bom 450.
15. *Expln. II(a)*; see also *Ameena Bi v. Kuppuswami Naidu*, (1993) 2 SCC 405; AIR 1993 SC 1628.
16. *Sistla Saraswatamma v. Paruvada Maki Naidu*, AIR 1940 Mad 881; *Samhut Rai v. Sambaran Rai*, AIR 1944 Pat 105.
17. *Ishan Chunder v. Beni Madhub*, (1897) 24 Cal 62; *Ajodhya Roy v. Hardwar Roy*, (1909) 1 IC 213 (Cal); *Kailash Chandra v. Gopal Chandra*, AIR 1926 Cal 798 at p. 808 (FB); *Gulzari Lal v. Madho Ram*, ILR (1904) 26 All 447 (FB); *Jagdish Lal v. M E. Periera*, AIR 1977 Del 12 at pp. 17-18; *Gauri Dutt v. D.K. Dowering*, AIR 1934 Pat 413; *Thondam*

or not can be decided by applying two tests: (1) Whether any portion of the interest of the decree-holder or of the judgment-debtor, which was originally vested in one of the parties to the suit, has by an act of the parties or by operation of law, vested in the person who is sought to be treated as a representative; and (2) If there has been devolution of interest, whether, so far as such interest is concerned, that person is bound by the decree.<sup>18</sup> Where during the execution proceedings a question arises as to whether any person is or is not the representative of a party, such question must be determined by the executing court itself.<sup>19</sup>

## (2) Execution, discharge or satisfaction of decree

The second condition for the applicability of this section is that the question must relate to the execution, discharge or satisfaction of the decree.

Though the expression "*questions relating to the execution, discharge or satisfaction of the decree*" has not been defined in the Code, it covers question of executability or non-executability of a decree.<sup>20</sup>

The following questions are held to be questions relating to the execution, discharge or satisfaction of decrees<sup>21</sup>: (i) whether a decree is executable; (ii) whether the property is liable to be sold in execution of the decree; (iii) whether the decree is fully satisfied; (iv) whether the execution of the decree was postponed; (v) whether an application to set aside sale is maintainable; (vi) whether the sale in execution is warranted by the terms of the decree; (vii) whether a particular property is or is not included in the decree; (viii) whether a party is or is not entitled to restitution of property; (ix) whether a person is or is not a "representative" of a party; (x) whether the decree-holder is in a position to carry out his part of the decree; (xi) whether the decree-holder is entitled to mould relief in accordance with the change of circumstances; (xii) whether the decree has been adjusted outside the court; (xiii) whether the decree has been validly assigned; (xiv) whether the auction-purchaser is entitled to recover possession; (xv) the question regarding identity of property; (xvi) the question regarding attachment, sale or delivery of property, etc.

Before the Amendment Act of 1976, there was a difference of opinion amongst different High Courts as to whether the question of delivery

*Annamalai v Tiruttani Ramaswami*, AIR 1941 Mad 161, *Gangabai Gopaldas Mohata v Fulchand* (1997) 10 SCC 387, AIR 1997 SC 1812

18 *Ajodhya Roy v Hardwar Roy*, (1909) 1 IC 213 (Cal) 9 Cal LJ 485, *Jaquish Lal v M E Periera*, AIR 1977 Del 12

19 Sub s (1) of S 47

20 *Union of India v S B Singh* AIR 1988 All 225, see also *supra* Chap 2

21 For detailed discussion and case law, see, Authors' *Code of Civil Procedure (Lawyers' Edn)* Vol. I at pp 756-58

of possession of the property to be given to an auction-purchaser fell under Section 47. Of course, in the case of *Harnandrai v. Debidutt*<sup>22</sup>, the Supreme Court had taken the view that such question relates to the execution, discharge or satisfaction of the decree. At the recommendation of the Law Commission<sup>23</sup>, clause (b) to Explanation II has now been inserted, which in express terms provides that all questions relating to delivery of possession of the property to a purchaser at the sale in execution of a decree shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree.

The following questions, on the other hand, are not questions relating to the execution, discharge or satisfaction of decrees<sup>24</sup>: (i) whether the decree is fraudulent or collusive; (ii) whether the decree has become inexecutable by a compromise subsequent to the passing of the decree in the previous suit; (iii) a question relating to the territorial or pecuniary jurisdiction of the court which passed the decree; (iv) a question relating to correctness or validity of the decree, except where the decree is a nullity; (v) an order of restoration of execution of application dismissed without going into its merits; (vi) an order reopening or refusing to reopen a decree; (vii) an order granting or refusing to grant instalments; (viii) a claim by an auction-purchaser for actual possession; (ix) a pre-decree arrangement between the parties; (x) an order appointing or refusing to appoint a Commissioner for effecting partition in a partition suit; (xi) a question relating to the amount of mesne profits; (xii) a question relating to maladministration by the executors of the deceased judgment-debtor; (xiii) an order fixing or refusing to fix upset price of the property sought to be sold in execution; (xiv) a question of return of movables not covered by the decree; (xv) a question regarding compensation for wrongs committed by the officers of the court in execution of the decree; (xvi) a question regarding contribution amongst judgment-debtors, etc.

## 6. POWERS OF EXECUTING COURT

An executing court has plenary power to determine all questions relating to execution of a decree.<sup>25</sup> The section, however, applies only to matters arising subsequent to the passing of the decree. It covers all questions which arise before as well as after the decree has been executed.<sup>26</sup> For the said purpose, the court can treat a suit as an execution

22. (1973) 2 SCC 467 at p. 471; AIR 1973 SC 2423 at p. 2446.

23. Law Commission's Twenty-seventh Report at p. 108

24. For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. I at pp. 758-60

25. *M P. Shreevastava v. Veena*, AIR 1967 SC 1193 (1967) 1 SCR 147.

26. *Merla Ramanna v. Nallaparaju*, AIR 1956 SC 87 at p. 91 (1955) 2 SCR 938.

application or an execution application as a suit in the interests of justice. When such power is exercised, normally the relevant date would be the date on which the original proceeding was instituted and not the date of conversion.<sup>27</sup> An executing court can mould relief in the light of changed circumstances.<sup>28</sup>

## 7. DUTIES OF EXECUTING COURT

An executing court cannot go behind the decree. It has to execute the decree as it is. It cannot question correctness or otherwise of the decree.<sup>29</sup> But where the terms of the decree are vague or ambiguous, it is the duty of the executing court to interpret the decree with a view to find out and ascertain the meaning of the terms used.<sup>30</sup> Again, where there is inherent lack of jurisdiction on the part of the court passing the decree, the executing court can refuse to execute the decree.<sup>31</sup>

## 8. OBJECTION TO VALIDITY OF DECREE

A court executing a decree cannot go behind the decree. But an objection as to its validity can be raised in execution proceedings if such objection appears on the face of the record. If the objection requires examination or investigation of facts, the executing court cannot entertain such objection.<sup>32</sup>

27. *Jugalkishore v. Raw Cotton Co. Ltd.*, AIR 1955 SC 376; 1955 SCR 1369; *Sugan Chand v. Prakash Chand*, (1969) 1 SCWR 837; *Shri Jagadguru Gurushiddaswami G.G. Murusavirmath v. D.M.D. Jain Sabha*, AIR 1953 SC 514; 1954 SCR 235.
28. *Yashpal Singh v. ADJ*, (1992) 2 SCC 504.
29. *C F Angadi v. Y S. Hirannayya*, (1972) 1 SCC 191; AIR 1972 SC 239, *Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman*, (1970) 1 SCC 670; AIR 1970 SC 1475. For detailed discussion, see *supra*, Chap 2.
30. *V Ramaswami v. Kailasa Thevar*, AIR 1951 SC 189; 1951 SCR 292, *Bhavan Vaja v. Solanki Hanuji Khodaji*, (1973) 2 SCC 40; AIR 1972 SC 1371. For detailed discussion, see *supra*, Chap 2.
31. *Kiran Singh v. Chaman Paswan*, AIR 1954 SC 340 at p 342 (1955) 1 SCR 117; *SBI v. Indexport Registered*, (1992) 3 SCC 159; AIR 1992 SC 1740. For detailed discussion, see *supra*, Chap 2.
32. *Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman*, (1970) 1 SCC 670; AIR 1970 SC 1475, *Sushil Kumar v. Gobind Ram*, (1990) 1 SCC 103, *Sabitri Dei v. Sarat Chandra Rout*, (1996) 3 SCC 301, *Urban Improvement Trust v. Lokul Narain* (1996) 4 SCC 178; AIR 1996 SC 1819. For detailed discussion and case law, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. I at pp 769-74.

9. GENERAL PRINCIPLES<sup>33</sup>

## 10. BAR OF SUIT

Section 47 of the Code bars a suit in respect of any objection in relation to execution proceedings. The bar is, however, limited to questions relating to the execution, discharge or satisfaction of the decree and not to issues which are totally different. If the case is not covered or the objection does not fall within four corners of Section 47, the bar will not operate and a suit would lie. Whether a subsequent suit is barred under Section 47 of the Code depends upon the nature of the decree which is to be executed and the relief claimed in the suit.<sup>34</sup>

## 11. APPEAL

Before the Amendment Act of 1976, the determination of a question under Section 47 was deemed to be a decree within the meaning of Section 2(2) of the Code<sup>35</sup> and was, therefore, subject to first appeal under Section 96 and also a second appeal under Section 100. Sub-section (2) of Section 47 as it stood before the Amendment Act of 1976 empowered the court to treat an application under Section 47 as a suit, or a suit as an application. The deletion of the word and figure "Section 47" from the definition of decree in Section 2(2) has now radically changed the position. The determination of any question under Section 47 is no longer *deemed to be a decree* within the meaning of Section 2(2) and is, therefore, not appealable under Section 96 or Section 100 of the Code. Sub-section (2) of Section 47 has, consequently, been omitted by the Amendment Act of 1976.<sup>36</sup>

33. For detailed discussion, see *supra*, Chap. 2

34. *Jai Narain v. Kedar Nath*, AIR 1956 SC 359. 1956 SCR 62; *Jamaluddin v. Asimullah*, AIR 1974 All 69; *Kuttan Sudhakaran v. Padmavathi Amma*, AIR 1987 Ker 94; *Balak Singh v. Ahmad Ullah Khan*, (1969) 2 SCC 39. AIR 1969 SC 1270.

35. The relevant part of S. 2(2), before the Amendment Act, 1976, read thus:

"decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in the controversy in the suit and may be either preliminary or final. *It shall be deemed to include the rejection of a plaint and the determination of any question within Section 47, or Section 144 but shall not include ...*

...

...

...

(emphasis supplied)

see also *Shakuntala Devi Jain v. Kuntal Kumari*, AIR 1969 SC 575 (577): (1969) 1 SCR 1006, see further *supra*, Pt. I, Chap. 2.

36. Sub-s. (2) of S. 47 prior to the Amendment Act, 1976 read as under:

"The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under the section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court fees."

There is, however, difference of opinion as to whether even after the Amendment Act of 1976, a determination of a question under Section 47 would still be a decree or not.

On the one hand, the High Court of Patna<sup>37</sup> has taken the view that by the Amendment Act of 1976, only the statutory fiction "a determination of a question under Section 47 shall be deemed to be a decree" has been omitted, still, however, if an order passed by a court satisfies the essential ingredients of Section 2(2), it would amount to a decree. By the amendment the statutory fiction disappears. It cannot now be said that the determination of any question under Section 47 is a decree. "Nevertheless, if an order passed by a court satisfies the essential characteristics of a decree, as now defined, *the mere fact that the order was passed in exercise of powers under Section 47 of the Code would not be of consequence.*"<sup>38</sup> (emphasis supplied) A similar view was taken by the High Court of M.P.<sup>39</sup>

On the other hand, the High Courts of Allahabad<sup>40</sup>, Andhra Pradesh<sup>41</sup>, Bombay<sup>42</sup>, Gauhati<sup>43</sup>, Gujarat<sup>44</sup>, Kerala<sup>45</sup>, Madhya Pradesh<sup>46</sup>, Madras<sup>47</sup>, Orissa<sup>48</sup>, Patna<sup>49</sup>, Punjab<sup>50</sup> and Rajasthan<sup>51</sup> have taken the view that after the Amendment Act of 1976, an order passed under Section 47 would not amount to a "decree" under Section 2(2).

It is submitted that the latter view appears to be correct for three reasons: *firstly*, as stated in the Statement of Objects and Reasons, the said provision was mainly responsible for delay in the execution of decrees,

37. *Parshava Properties Ltd. v. A.K. Bose*, AIR 1979 Pat 308, [overruled in *Masomat Narmada Devi v. Ram Nandan Singh*, AIR 1987 Pat 33; 1986 Pat LR 1067, 1986 BLJR 799 (FB)]
38. *Ibid.*, at p. 310 per Sarwar Ali, A.C.J.; see also *Rai Mathura Prasad v. Bihar Hindu Religious Trust Board*, AIR 1984 Pat 227.
39. *Chuluram v. Bhagatram*, AIR 1980 MP 16, *Sitaram v. Chaturu*, 1981 Jab LJ 171, [overruled in *Babulal v. Ramesh Babu*, AIR 1990 MP 317 (FB)]
40. *Pratap Narain v. Ram Narain*, AIR 1980 All 42 (FB).
41. *Marriddi Janikamma v. Hanumantha Vajjula*, AIR 1980 AP 209; *Challa Ramamurty v. Pasumarti Adinarayana Sons*, AIR 1985 AP 42.
42. *Rameshkumar v. Rameshwar*, AIR 1983 Bom 378.
43. *Tapan Chandra v. Dulal Chandra*, AIR 1980 Gau 3.
44. *Mohanlal v. Bai Maniben*, (1979) 20 Guj LR 711, *Hasumatiben v. Ambhalal*, AIR 1982 Guj 324, (1981) 1 Guj LH 337; (1982) 2 Guj LR 346, *John Mithalal v. Dineshkhari*, (1997) 2 Guj LH 506.
45. *Mohd. Khan v. State Bank of Travancore*, AIR 1978 Ker 201 (FB), *Kuriakose v. P.K. Narayanan Nair*, AIR 1981 Ker 18.
46. *Babulal v. Ramesh Babu*, AIR 1990 MP 317 (FB).
47. *Visalakshi v. Muthiah Chettiar*, (1983) 2 MI 1 447.
48. *Sarabai Agarwalla v. Haradhan Mahapatra*, AIR 1982 Ori 9, *Dhusasan Nayak v. Dhadi Nayak*, AIR 1983 Ori 127, *Bhima Das v. Ganeswar Mahapatra*, AIR 1984 Ori 229.
49. *Masomat Narmada Devi v. Ram Nandan Singh*, AIR 1987 Pat 33; 1986 Pat LR 1067, 1986 BLJR 799 (FB).
50. *Ram Narain v. Mithan Lal*, AIR 1979 P&H 262, *Jagat Ram v. Jagat Singh*, AIR 1984 P&H 281.
51. *Monan Das v. Kamla Devi*, AIR 1978 Raj 127, *Kashiram v. Hansrai*, AIR 1983 Raj 145.

and the Joint Committee, therefore, recommended to omit the determination of a question under Section 47 from the definition of a decree in Section 2(2);<sup>52</sup> *secondly*, the omission of sub-section (2) of Section 47 is made in pursuance of the legislative policy that all questions between the parties to the suit in which the decree was passed and their representatives should be disposed of under Section 47 and not by a separate suit. The result is that a determination of any question within this section would no longer be regarded as a decree<sup>53</sup>, and *thirdly*, wherever any order is intended to be made appealable as a decree, a specific provision is made to that effect in the Code itself.<sup>54</sup> It follows, therefore, that the deletion of such a provision in the definition of "decree" in sub-section (2) of Section 2 indicates the intention of the Legislature not to make an order under Section 47 appealable as a decree.

However, if a decree is passed prior to passing of the Amendment Act of 1976, a right can be said to have accrued in favour of a party to file an appeal against such a decree even after the Amendment Act of 1976 came into force.<sup>55</sup>

## 12. REVISION

Since after the Amendment Act of 1976 an order under Section 47 does not amount to a decree, it is not appealable under Section 96 and Section 100. A revision application under Section 115 of the Code is, therefore,

52. "The Committee note that according to the definition of the expression 'decree' given in the Code, the determination of any question under S. 47 amounts to a decree and, as such, an appeal and second appeal would lie against such determination. The Committee is of the view that this provision of the Code is mainly responsible for the delay in the execution of decrees. The Committee, therefore, felt that the definition of the term 'decree' should be amended so that the determination of the question under S. 47 may not amount to a decree." Report of the Joint Committee; see, Gazette of India, Extra., dt. 1-4-1976, Pt. II, S. 2 at pp. 804-05.
53. The omission of sub-s. (2) has been made in consequence of the change made in the definition of the word "decree" in S. 2(2), the result of which is that a determination of any question within this section would no longer be regarded as a decree. "It would be incongruous after that change to permit the court to convert an application into a suit and order payment of court fees and yet say that a determination therein is not a decree." Mulla, *Civil Procedure Code* (1995) Vol. 1 at p. 388.
54. Or. 21 Rr 43-A(2)(c), 46-B, 46-C, 46-E, 46-H, 50(3), 58(4), 98, 100 (103).
55. *Pratap Narain v. Ram Narain*, AIR 1980 All 42 (FB), *Challa Ramamurty v. Pasumarti Adinarayana Sons*, AIR 1985 AP 42, *Rameshkumar v. Rameshwar*, AIR 1983 Bom 378; *Syndicate Bank v. Rallies India Ltd.*, AIR 1979 Del 40; *Chuluram v. Bhagatram*, AIR 1980 MP 16; *Nanda Kishore v. Mahabir Prasad*, AIR 1978 Ori 129; *Bhima Das v. Ganeswar Mahapatra*, AIR 1984 Ori 229, *Mohan Das v. Kamla Devi*, AIR 1978 Raj 127. For detailed discussion, see, *Authors' Code of Civil Procedure* (Lawyers' Edn.) Vol. 1 at pp. 785-88.

maintainable provided the conditions laid down in Section 115 are satisfied.<sup>56</sup> No writ petition, however, would be maintainable.<sup>57</sup>

### 13. PENDING MATTERS

Section 97 of the Amendment Act of 1976 (Repeal and Savings) declares that the amendment made in Section 2(2) will not affect pending appeals and they will be dealt with as if the amendment had not come into force.<sup>58</sup>

56 For detailed discussion of "Revisional jurisdiction", see *supra*, Pt III, Chap 9.

57 *Ghan Shyam Das v Anant Kumar Sinha* (1991) 4 SCC 379 AIR 1991 SC 2251

58 Section 97(2)(a), see also *Ganikapati Veeraya v N Subbiah Chaudhry*, AIR 1957 SC 540; 1957 SC R 488

## CHAPTER 9

# Adjudication of Claims

### SYNOPSIS

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### 1. NATURE AND SCOPE

#### (a) Position prior to Amendment Act, 1976

Before the amendment in the Code in 1976, the executing court used to deal with investigation of claims and objections "summarily". The scope of such inquiry was very limited and confined to possession<sup>1</sup> and it was open to the aggrieved party to institute a suit.<sup>2</sup>

#### (b) Position after Amendment Act, 1976

Pursuant to the recommendations of the Law Commission<sup>3</sup> amendments have been made in the Code expressly providing that all questions (including questions of title) are to be settled "finally" (and not summarily) in execution proceeding itself and not by a separate suit.<sup>4</sup> A provision has also been made that the court should not entertain an

1. *Sawai Singhai Nirmal Chand v. Union of India*, AIR 1966 SC 1068: (1966) 1 SCR 986.
2. *Ibid*, see also, R. 63.
3. Law Commission's Fourteenth Report, Vol. 1 at pp. 452-53; Law Commission's Twenty-seventh Report, Vol. 1 at p. 198.
4. R. 58(1)(2); see also *Nancy John v. Prabhat Lal*, (1987) 4 SCC 78: AIR 1987 SC 2061.

objection or claim if before the claim is preferred or objection is raised against attachment, the property is sold, or the court considers that the claim or objection had been raised to delay the proceedings.<sup>5</sup>

Where the court entertains a claim or objection it must investigate *fully* and not *summarily* and adjudicate upon all questions, including the questions of right, title and interest in the property under attachment.

The court shall, in accordance with such determination—(a) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit; or (b) disallow the claim or objection; or (c) continue the attachment subject to any mortgage, charge or other interest in favour of any person; or (d) pass such order as in the circumstances of the case it deems fit.<sup>6</sup>

## 2. SCHEME

Where any property is attached in execution of a decree, it is always open to the parties, their representatives or third parties to raise objection against such attachment.

If the objection is raised by a party or his representative, the question falls under Section 47 of the Code and should be decided by the executing court and not by a separate suit.

If, on the other hand, such objection is raised by a third party, two courses are open to him. *Firstly*, he may straightway file a suit claiming appropriate relief. *Secondly*, he may file an application under Order 21 Rule 58 of the Code to the executing court.

Where the executing court entertains a claim or objection, it will hold a full-fledged enquiry into the right, title and interest of the claimant or objector and record a finding either upholding the claim or objection or rejecting it. The remedy available to the aggrieved party is to prefer an appeal against the order and not to file a suit.

## 3. OBJECT

Rules 58 to 63 of Order 21 deal with adjudication of claims to and objections to attachment of property. Where the property is attached in execution of a decree, there may be objections to such attachment either by a party or his representative or by a third party. Since all questions arising between the parties to the suit in which the decree under execution has been passed, or their representatives relating to the execution, discharge or satisfaction of the decree are to be determined by the court executing the decree and not by a separate suit<sup>7</sup>, the executing court has to investigate the claims and settle them "finally" in execution

5      Proviso to R 58(1)

6      R 58(3)

7      S. 47

proceedings, to avoid protracted litigation.<sup>8</sup> Detailed provisions, therefore, have been made in the Code.

#### 4. SECTION 47 AND ORDER 21, RULE 58: DISTINCTION

Both Section 47 and Order 21, Rule 58 of the Code are similar in certain aspects. Both of them relate to execution proceedings. Both enact that all questions covered by them should be decided by executing court. Both the provisions expressly bar filing of a suit.

In spite of these similarities, there is essential distinction between the two. Whereas Section 47 applies to parties to the suit (or their representatives), Order 21, Rule 58 applies to third parties (or their representatives). Section 47 not only bars a suit but also bars an appeal. Order 21, Rule 58 bars a suit but not an appeal. On the contrary, sub-rule (4) of Rule 58 expressly states that the order passed by the executing court "shall have the same force and be subject to the same conditions as to appeal (or otherwise) as if it were a decree". Finally, bar of suit under Section 47 is absolute and unqualified, while bar under Order 21, Rule 58 is conditional and qualified.<sup>9</sup>

#### 5. WHO MAY APPLY?

Any person who at the time of attachment of property has some right, title or interest in or possessed of the property attached, may lodge a claim or raise an objection against the attachment.<sup>10</sup>

#### 6. WHERE APPLICATION LIES?

A claim petition may be filed in the court which has attached the property. Where a special statute confers exclusive jurisdiction on a particular court, a petition can only be filed in that court. Thus, in a case of claim by or against a Bank in liquidation, a petition may be instituted in the High Court under the Banking Regulation Act, 1949.<sup>11</sup>

8. Statement of Objects and Reasons, Gazette of India, Extra., dt. 8-4-1974, Pt. II, S. 2 at p. 324.

9. See also *supra*, "Scheme", "Suit", *infra*

10. *Union of India v. Jardine Henderson Ltd.*, (1979) 2 SCC 258. AIR 1979 SC 972.

11. *Alphonse Ligouri v. Court Liquidator*, 1967 KLT 1102; *Comrade Bank Ltd. v. Jyoti Bala Dassi*, AIR 1962 Cal 86; (1962) 66 CWN 761.



# CHAPTER 10

## Sale of Property

### SYNOPSIS

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### 1. GENERAL

As already seen, a decree may be executed by attachment and sale or by sale without attachment of any property. In Chapter 7 we have discussed the provisions regarding attachment of property. In the present chapter let us study material provisions relating to sale and delivery of properties. Sections 65 to 73 and Rules 64 to 94 of Order 21 deal with the subject relating to sale of movable and immovable properties.

## 2. SALE OF PROPERTY: GENERAL: RULES 64-73

### (a) Power of court: Rules 64-65

Rule 64 of Order 21 provides that any court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree shall be sold, and the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

This rule enjoins that in all execution proceedings the court has to enquire whether sale of part of the property would be sufficient to satisfy the decree. This is not just a discretion but an obligation and a mandate of the Legislature. The sale held in contravention of this mandatory requirement is illegal and without jurisdiction.<sup>1</sup>

A duty is thus cast upon the court to sell such property or a portion thereof as necessary to satisfy the decree.<sup>2</sup> "It is a mandate of the Legislature which cannot be ignored."<sup>3</sup> Rule 65 enacts that every sale in execution of a decree shall be conducted by an officer of the court by public auction.

### (b) Proclamation of sale: Rules 66-67

After the property is attached and ordered to be sold by public auction, the first step to be taken by the court is to cause a proclamation of the intended sale to be made in the language of the court.<sup>4</sup> Such proclamation shall be drawn up after notices to the decree-holder and the judgment-debtor and shall state the following details:

- (i) time and place of sale;
- (ii) property or a part thereof to be sold;
- (iii) revenue, if any, assessed upon the property;
- (iv) encumbrance, if any, to which the property is liable;
- (v) amount to be recovered;
- (vi) such other particulars which the court considers material for a purchaser to know in order to judge the nature and value of the property.<sup>5</sup>

1. *Ambati Narasayya v. M. Subba Rao*, 1989 Supp (2) SCC 693 at pp 694-65 AIR 1990 SC 119 at pp 120-21; *Takkaseela Pedda v. Padmavathamma*, (1977) 3 SCC 337 at p 340 AIR 1977 SC 1789 at p. 1791, *Desh Bandhu Gupta v. N L. Anand*, (1994) 1 SCC 131 1993 AIR SCW 3458, *Lal Chand v. ADJ*, (1997) 4 SCC 356 AIR 1997 SC 2106, *S. Mariyappa v. Sidappa*, (2005) 10 SCC 235, *Balakrishnan v. Malayandi Konar* (2006) 3 SCC 49 AIR 2006 SC 1458

2. *Ibid.*, see also *Amiya Prosad v. Bank of Commerce Ltd.* (1996) 7 SCC 167 AIR 1996 SC 1762, *S. S. Dayananda v. K. S. Nagesh Rao*, (1997) 4 SCC 451.

3. *Ambati Narasayya v. M. Subba Rao*, 1989 Supp (2) SCC 693.

4. R 66(1), *Desh Bandhu Gupta v. N L. Anand*, (1994) 1 SCC 131 at p 143.

5. R 66(2).

Service of notice on a judgment-debtor is a fundamental step in execution and, unless it is waived, it must be complied with. Absence of notice causes irremedial injury to the judgment-debtor and sale without such notice will be a nullity.<sup>6</sup>

It is the duty of the court to ensure that the requirements of Rule 66 are complied with.<sup>7</sup> It is also desirable that every proclamation of sale shall be made by beat of drum or other customary mode and a copy of the proclamation must be affixed on a conspicuous part of the property and of the courthouse and also in the Collector's Office if the property is land paying revenue.<sup>8</sup> Such proclamation should also be published in the Official Gazette or in a local newspaper, or in both, if the court so directs.<sup>9</sup>

The object of issuing a proclamation is twofold; *firstly*, it protects the interests of the intending purchasers by giving them all material information regarding the property to be sold; and *secondly*, it protects the interests of the judgment-debtor by facilitating the fetching of proper market price for his property and by preventing it from being knocked down at public auction for a price much below the market price.<sup>10</sup>

A sale conducted without publication of proclamation is not merely an irregularity but a nullity.<sup>11</sup> It is incumbent on the court to be scrupulous to the extreme. No action of the court or its officer should be such as to give rise to the criticism that it was done in a casual manner.<sup>12</sup> Thus, when the sale was notified in the village by beat of drum and people started coming thereafter and only five persons participated in the bid including the decree-holder, the procedure was held to be illegal.<sup>13</sup>

### (c) Time of sale: Rule 68

Unless the property ordered to be sold is perishable or the expense of keeping it in custody is likely to exceed its value<sup>14</sup>, no sale without the consent in writing of the judgment-debtor can be conducted before fifteen days in case of immovable property and before seven days in case of movable property from the date of proclamation in the courthouse.<sup>15</sup>

6. *Desh Bandhu Gupta v. N.L. Anand* (1994) 1 SCC 131.

**(d) Adjournment of sale: Rule 69(1), (2)**

The court may, at its discretion, adjourn any sale to a specified day and hour. But if such sale is adjourned for more than thirty days, a fresh proclamation should be issued unless the judgment-debtor waives it.<sup>16</sup>

**(e) Stoppage of sale: Rule 69(3)**

Every sale shall be stopped if, before the property is knocked down, the debt and costs are tendered to the officer conducting the sale, or paid into the court.<sup>17</sup>

**(f) Default by purchaser: Rule 71**

Any deficiency of price on resale necessitated by the purchaser's default shall be recoverable from the defaulting purchaser.<sup>18</sup> This provision is salutary and has been enacted with a view to minimize the hardship of the judgment-debtor or decree-holder resulting from the auction-purchaser's default. It also seeks to provide an expeditious remedy to the aggrieved party (judgment-debtor or decree-holder), who has suffered due to the default of the auction-purchaser. Therefore, if resale is not ordered because of the default of the auction-purchaser, Rule 71 will not apply.<sup>19</sup>

Though the provisions of Rule 71 are of summary nature, principles of natural justice apply to them. Before the auction-purchaser is held liable under this rule, he must be given notice and opportunity of hearing to show cause why an order adverse to him should not be passed.<sup>20</sup>

**(g) Restrictions to bid: Rules 72-73**

(a) A decree-holder cannot, without the express permission of the court, purchase the property sold in execution of his own decree.<sup>21</sup> When he does so with the permission of the court, he is entitled to a set-off, but if he does so without such permission, the court has a discretion to

16. R 69(1), (2).

17. R 69(3), see also, R 59; *Radhey Shyam v. Shyam Behari*, (1970) 2 SCC 405 AIR 1971 SC 2337.

18. R. 71.

19. *Gopal Krishan Das v. Satendra Nath*, (1975) 1 SCC 815 at p 821 AIR 1975 SC 1290 at p. 1294; *Ramagiri Neelakantagiri v. Annavaiahala Venkatachallam*, AIR 1925 PC 61, *Annavaiahala Venkatachellamayya v. Rama Girjee Nilakanta Girjee*, ILR (1918) 41 Mad 474 43 IC 685.

20. *Annavaiahala Venkatachellamayya v. Ramagiri Neelakanta*, ILR (1918) 41 Mad 474 43 IC 685. For detailed discussion of natural justice, see, *Authors' Lectures on Administrative Law* (2012) Lecture VI.

21. R 72(1), see also *Manu Lal Mohanlal v. Sardar Sayed Ahmed*, AIR 1954 SC 349 at p 351 (1955) 1 SCR 108.

set aside the sale upon the application by the judgment-debtor, or any other person whose interests are affected by the sale.<sup>22</sup>

This provision is intended to safeguard the interests of the judgment-debtor.<sup>23</sup> Such permission, therefore, should be cautiously granted after considering all the attending circumstances.<sup>24</sup> The court will have to be satisfied that without granting permission to the decree-holder, an advantageous sale cannot otherwise be had.<sup>25</sup>

Even though there is no express requirement for issue of notice to the judgment-debtor in Rule 72 before granting permission to the decree-holder, since it vitally affects the rights of the judgment-debtor, the rules of natural justice require that a notice should be given to him.<sup>26</sup> The decision to grant permission is administrative and not judicial. It is, therefore, not necessary for the court to pass a speaking order or to record reasons in support of grant of leave to the decree-holder to bid. But the order must reflect application of mind by the executing court.<sup>27</sup>

For getting a sale set aside it is not sufficient to show that there was an illegality or irregularity in the conduct of the sale, the applicant has to show that substantial injury has been caused to him as a result of non-issuance of the notice.<sup>28</sup>

Where the auction-purchaser is a stranger or an outsider, sale by public auction would normally protect him even if the decree is finally set aside. This is based on the doctrine of justice and equity.<sup>29</sup> But where the auction-purchaser is the decree-holder himself, he would not be entitled to any relief since he was aware of all the proceedings.<sup>30</sup>

An order setting aside or refusing to set aside sale is appealable.<sup>31</sup>

(b) A mortgagee of immovable property cannot, without the leave of the court, purchase the property sold in execution of a decree on

22. R. 72(2), (3).

23. *Sivathi Ammal v. Arulayee Ammal*, AIR 1974 Mad 34: (1973) 2 MLJ 325.

24. *S.K.M. Mohd. Mustafa v. Udaimachi Ammal*, AIR 1966 Mad 348: (1966) 1 MLJ 373.

25. *Sivathi Ammal v. Arulayee Ammal*, AIR 1974 Mad 34 (1973) 2 MLJ 325.

26. *G. Subramania Mudaliar v. Ideal Finance Corpn.*, AIR 1977 Mad 358 at pp. 361-63; *Jaswantlal Natvarlal v. Sushilaben Manilal*, 1991 Supp (2) SCC 691: AIR 1991 SC 770. For a detailed discussion regarding "natural justice", see, *Authors' Lectures on Administrative Law* (2012) Lecture VI.

27. *S.K.M. Mohd. Mustafa v. Udaimachi Ammal*, AIR 1966 Mad 348: (1966) 1 MLJ 373. (But see *supra*, *D.S. Chohan v. State Bank of Patiala*.)

28. *Jaswantlal Natvarlal v. Sushilaben Manilal*, 1991 Supp (2) SCC 691 at pp. 692-93: AIR 1991 SC 770 at p. 771.

29. *Janak Raj v. Gurdial Singh*, AIR 1967 SC 608: (1967) 2 SCR 77; *Chinnammal v. P. Arumugham*, (1990) 1 SCC 513. AIR 1990 SC 1828, *Padanathil Ruqmini v. P.K. Abdulla*, (1996) 7 SCC 668: AIR 1996 SC 1204.

30. *Ibid*, see also *Binayak Swain v. Ramesh Chandra*, AIR 1966 SC 948; *Maqbool Alam v. Khodaiya*, AIR 1966 SC 1194: (1966) 3 SCR 479, *Sardar Govindrao Mahadik v. Devi Sahai*, (1982) 1 SCC 237: AIR 1982 SC 989.

31. Or. 43 R. 1(j).

the mortgage.<sup>32</sup> This is a mandatory requirement.<sup>33</sup> When such leave is granted to the mortgagee decree-holder, the court shall fix a reserve price so that the mortgagee may not take undue advantage by purchasing the mortgaged property at a lower price and then pursuing other remedies to recover the balance of the amount of the decree.<sup>34</sup>

(c) Any officer or other person having any duty to perform in connection with any execution sale, cannot, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold

harvested, at or near the place where the crop is lying.<sup>37</sup> The court may, however, direct the sale to be held at the nearest place of public resort, if it is of the opinion that the produce may fetch a better price.<sup>38</sup> Such sale shall be postponed by the court, if (i) fair price is not offered; or (ii) the owner thereof applies for such postponement.<sup>39</sup>

Where the property to be sold is growing crop, no sale shall be held until the crop is harvested.<sup>40</sup> Where such crop cannot be stored, the purchaser may enter the field for cutting and harvesting it.<sup>41</sup>

#### (d) Negotiable instruments and shares: Rule 76

In the case of a negotiable instrument or a share in a corporation, the court has power to order sale through a broker instead of by public auction.<sup>42</sup> On such sale, the purchaser acquires a title.<sup>43</sup>

#### (e) Payment of price: Rule 77

The price of the property shall be paid at the time of sale.<sup>44</sup> On payment of price, the sale becomes absolute.<sup>45</sup> Confirmation of sale by the court is not necessary as in the case of sale of immovable property.<sup>46</sup> In case of default by the purchaser in payment of price, the property will forthwith be resold<sup>47</sup> and the defaulting purchaser would be liable for the deficiency in price on such resale.<sup>48</sup>

#### (f) Irregularity in sale: Rule 78

Rule 78 provides that a sale of movable property in execution of a decree cannot be set aside on the ground of irregularity in publishing or conducting the sale.<sup>49</sup> Violation of provisions relating to the sale of

37. R. 74(1); see also *Lakshmibai v. Santapa Revapa Shintre*, ILR (1889) 13 Bom 22.

38. Proviso to R. 74(1). 39. R. 74(2). 40. R. 75(1).

41. R. 75(2).

42. R. 76; see also *Seth Banarsi Dass v. District Magistrate and Collector, Meerut*, (1996) 2 SCC 689; AIR 1996 SC 2311.

43. *Balkrishnan Gupta v. Swadeshi Polytex Ltd.*, (1985) 2 SCC 167 at pp. 192-93; AIR 1985 SC 520 at p. 534; *Seth Banarsi Dass v. District Magistrate and Collector, Meerut*, (1996) 2 SCC 689.

44. R. 77(1). See also *Thacker's Press & Directories Ltd. v. Metropolitan Bank Ltd.*, (1963-64) 67 CWN 350.

45. R. 77(2).

46. R. 92. See also *Sebastian v. Official Receiver*, 1968 KLJ 381; *Lokman Chhabilal Jain Bani v. Motilal Tulsiram Agarwala*, AIR 1939 Nag 269; *Dharm Singh v. Ram Bhejamal*, AIR 1930 Lah 236; *Habib Sheikh v. State of U.P.*, AIR 2005 All 270.

47. R. 77(1). 48. R. 71.

49. *Dhirendra Nath v. Sudhir Chandra*, AIR 1964 SC 1300; (1964) 6 SCR 1001; *Sebastian v. Official Receiver*, 1968 KLJ 381, *Dharm Singh v. Ram Bhejamal*, AIR 1930 Lah 236.

movable property does not *ipso facto* make the sale void. The petitioner has to show that substantial injury has been sustained by him.<sup>50</sup> But where objections have been raised by the judgment-debtor which may go to the root of the matter, they must be decided prior to the holding of the auction-sale. Failure to do so would vitiate the sale.<sup>51</sup>

Any person sustaining any injury by reason of any irregularity in the sale at the hands of any other person may sue him for compensation, or, if such person is the purchaser, for recovery of the specific property and for compensation in default of such recovery.<sup>52</sup> Again, an application to set aside a sale of movable property lies where the court had no jurisdiction to order the sale.<sup>53</sup> Similarly, the provision does not curtail inherent powers of the court where it is satisfied that the orders had been obtained by practising fraud on the court. In such cases, it is not open to anyone to contend that the court has become *functus officio*. The court retains jurisdiction to recall orders.<sup>54</sup>

#### 4. SALE OF IMMOVABLE PROPERTY: RULES 82-94

##### (a) General

Rules 82 to 94 of Order 21 deal with sale of immovable property. Rule 83 enables the executing court to postpone sale to enable the judgment-debtor to raise decretal dues by private alienation. Rules 84 and 85 provide for payment of purchase money by auction-purchaser. Rule 86 covers cases of default by auction-purchaser in making requisite payment and resale of property. Rules 89 to 91 and 93 deal with setting aside sale and effect thereof. Rules 92 and 94 provide for confirmation of sale and issuance of sale-certificate. Section 65 declares the effect of sale.

##### (b) Courts competent to order sale: Rule 82

Any court other than a Court of Small Causes may order sale of immovable property in execution of a decree.<sup>55</sup>

50. *Jaswantlal Natvarlal v. Sushilaben Manilal*, 1991 Supp (2) SCC 691; AIR 1991 SC 770.

51. *Seth Banarsi Dass v. District Magistrate and Collector, Meerut*, (1996) 2 SCC 689 at pp 693-94; AIR 1996 SC 2311.

52. *Dhirendra Nath v. Sudhir Chandra*, AIR 1964 SC 1300; *Balkrishnan Gupta v. Swadeshi Polytex Ltd.*, (1985) 2 SCC 167 at pp 192-93; AIR 1985 SC 520 at p 534.

53. *Nemi Chand v. Dhanmukh Dass*, ILR (1953) 3 Raj 288; *Pratulia Chandra v. Calcutta Credit Corpn.*, AIR 1965 Ass 21.

54. *Baidyanath Durev v. Deonandan Singh*, 1968 SCD 275 (1967) 2 SCWR 727.

55. R 82; see also *Jibon Krishna v. New Beerbhumi Coal Co. Ltd.*, AIR 1960 SC 297 (1960) 2 SCR 198.



the purchaser to deposit the amount, the property will forthwith be resold<sup>66</sup> and the defaulting purchaser will be liable for the deficiency in price.<sup>67</sup>

The balance of the purchase money must be paid by the purchaser within fifteen days from the date of the sale.<sup>68</sup> In case of default in payment of price by the auction-purchaser, the amount of deposit can be forfeited<sup>69</sup> and the property shall be resold after issuing a fresh notification,<sup>70</sup> unless the judgment-debtor satisfies the decree by making payment before resale.

Failure to deposit the purchase price is not a mere irregularity in the sale and it cannot be averted on the plea that such shortfall had been occasioned by a mistake of the court in calculating the amount.<sup>71</sup> The provisions indicate responsibility of the decree-holder and it is not open to him to claim that he was misled by the court in the specification of the amount. The blame, if any, for the mistake lies squarely on the decree-holder. "A mistake for which the decree-holder himself is responsible cannot furnish a ground to the decree-holder to aver the adverse consequences on him of his failure to comply with the mandatory requirement."<sup>72</sup>

The provisions requiring the auction-purchaser to deposit the balance amount within fifteen days of the sale is also mandatory and non-compliance with the same vitiates the sale. The court has no jurisdiction to extend the time for the payment of the balance price. In case of default of such payment, the court has discretion to forfeit the deposit. The court must order resale of the property. This is an imperative obligation on the part of the court. A further consequence of non-payment is that the defaulting purchaser forfeits all claim to the property.<sup>73</sup>

The ambit and scope of the provisions of Rules 84 to 86 of Order 21 have been very succinctly and appropriately explained by the Supreme Court in *Manilal Mohanlal v. Sardar Sayed Ahmed*<sup>74</sup> in the following words.

"Having examined the language of the relevant rules and the judicial decisions bearing upon the subject we are of the opinion that the provisions of the rules requiring the deposit of 25 per cent of the purchase money immediately, on the person being declared as a purchaser and the payment of the balance within 15 days of the sale are mandatory and upon non-compliance with these provisions there is no sale at all. The rules do not contemplate that there can be any sale in favour of a purchaser without depositing 25 per cent of the purchase money in the first instance and the balance within 15 days. When there is no sale within the contemplation of

66 R 84(1)

67 R 71

68 R 85

69 R 86

70 R 87

71 *Balram v. Ilam Singh*, (1996, 5 SCC 705 AIR 1996 SC 2781.

72 *Ibid* at p. 713 (SCC) at p. 285 (AIR)

73. *Manilal Mohanlal v. Sardar Sayed Ahmed*, AIR 1954 SC 349 (1955) 1 SCR 108

74 AIR 1954 SC 349 (1955) 1 SCR 108

these rules, there can be no question of material irregularity in the conduct of the sale. *Non-payment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete nullity.*"<sup>75</sup> (emphasis supplied)

**(e) Bid by co-owner: Rule 88**

Where property sold is a share of undivided immovable property of two or more persons, a co-sharer has a right of pre-emption. The object of this provision is to enable co-sharers in the undivided immovable property to keep strangers out if they so desire.<sup>76</sup>

**(f) Setting aside sale: Rules 89-92**

Rules 89 to 92 deal with setting aside of sale. When a property is sold in execution of a decree, an application for setting aside sale may be made under these provisions by the persons affected and the grounds mentioned therein. Such an application has to be made within the prescribed period of limitation (60 days).<sup>77</sup> But an application to set aside sale of immovable property cannot be made on any other ground not covered by Rules 89 to 91.<sup>78</sup> In other words, the provisions of Rules 89 to 91 of Order 21 as to setting aside execution sale are exhaustive.

**(I) On deposit: Rule 89**

(i) *Nature and scope.*—Rule 89 of Order 21 provides for setting aside execution sale on payment of five per cent of purchase price to the auction-purchaser and entire amount specified in the proclamation for sale to the decree-holder.

(ii) *Object.*—Rule 89 deals with the setting aside of sale on the deposit of the amount specified in the proclamation of sale. The underlying

auction-purchaser by paying him five per cent of the purchase money.<sup>80</sup> The rule being in the nature of a concession must be strictly complied with.<sup>81</sup> The words "on his depositing in court" show that deposit is a condition precedent to the making of an application to set aside a sale.<sup>82</sup>

(iii) *Who may apply?*—Any person claiming any interest as existing at the time of the sale or at the time of making an application may avail of the benefit of Rule 89. The expression "interest" has a very wide import and should be construed liberally so as to enable a party having any inchoate right to apply under this rule.<sup>83</sup>

Thus, the following persons are entitled to apply under Rule 89:

- (i) a judgment-debtor;
- (ii) a co-sharer in the property;
- (iii) a member of a Joint Hindu Family;
- (iv) receiver;
- (v) a creditor of judgment-debtor;
- (vi) a beneficial owner;
- (vii) a lessee;
- (viii) a mortgagee;
- (ix) a person in possession of the property;
- (x) a *benamidar*, transferee, etc.

In case of manifest illegality in conducting the sale, the court may take proceedings *suo motu* and set aside the sale even after the expiry of the period of limitation prescribed therefor.<sup>84</sup>

(iv) *Conditions.*—The provisions of Rule 89 are not intended to defeat the claim of the decree-holder or the auction-purchaser, unless the decree is simultaneously satisfied.<sup>85</sup> Rule 89, therefore, requires that two primary conditions relating to deposit must be fulfilled, namely, (i) the applicant must deposit in the court for payment to the auction-purchaser five per cent of the purchase money; and (ii) he must also deposit the amount specified in the proclamation of sale, less any amount received by the decree-holder since the date of proclamation of sale for payment to the decree-holder.<sup>86</sup>

Since the rule is in the nature of a concession shown in favour of the judgment-debtor, the requirements thereof must be strictly complied

80. *Tribhovandas v Ratilal*, AIR 1968 SC 372 at p 375 (1968) 1 SCR 455 *Himmatbhai v. Rikhilal*, (1978) 2 SCC 160; AIR 1978 SC 918, *Challamane Huchha Gowda v M R Tirumala*, (2004) 1 SCC 453

81. *T L Jagannatha v B H Krishna*, AIR 1962 Mad 99 (1961) 2 MLJ 509 *Nanhelal v Umrac Singh*, (1930-31) 58 IA 50; AIR 1931 PC 33 130 IC 686

82. *P K Unni v Nirmala Industries*, (1990) 2 SCC 378 at p 381 AIR 1990 SC 933

83. *Onkar Nath v Ramanand Prasad* AIR 1970 Pat 168

84. *Nani Gopal Paul v T Prasad Singh* (1995) 3 SCC 579 AIR 1995 SC 1971

85. *Tribhovandas v Ratilal*, AIR 1968 SC 372 at p 375 (1968) 1 SCR 455

86. *Tribhovandas v Ratilal* AIR 1968 SC 372.

with. The provision of the rule regarding the two deposits is mandatory and in case of failure to comply with any of them no sale can be set aside.<sup>87</sup> Such deposit must be unconditional and not under protest.<sup>88</sup> Further, it must be in cash and not by cheque or Government promissory note.<sup>89</sup>

(v) *Limitation*.—An application to set aside a sale must be made within a period of sixty days from the date of the sale.<sup>90</sup> The executing court has no jurisdiction to entertain an application for setting aside a sale after the prescribed period by invoking Section 148 of the Code or by applying Section 5 of the Limitation Act.<sup>91</sup>

(vi) *Notice*.—Before an order setting aside a sale is made, notice of the application must be given to all persons likely to be affected by the order thereon.<sup>92</sup> Since the object of giving notice is to give an opportunity of hearing to the interested party, if he is aware of the application, the absence of a formal notice does not vitiate the proceedings.<sup>93</sup>

(vii) *Appeal*.—An order setting aside a sale or refusing to set aside a sale under Rule 92 is appealable.<sup>94</sup>

## (II) For irregularity or fraud: Rule 90

(i) *Nature and scope*.—A sale of immovable property in execution can be set aside also on the ground of material irregularity or fraud in publishing or conducting the sale, provided the applicant proves that he has sustained substantial injury by reason of such irregularity or fraud.<sup>95</sup> The pre-sale illegalities committed in the execution are amenable to the remedy under Section 47. Post-sale irregularities causing substantial injury to the judgment-debtor are covered under Rule 90 of Order 21.<sup>96</sup>

87. *Ibid*, see also *P.K. Unni v. Nirmala Industries*, (1990) 2 SCC 378.

88. *L.A. Krishna Ayyar v. Arunachalam Chettiar*, AIR 1935 Mad 842 (FB); *T.L. Jagannatha v. B.H. Krishna*, AIR 1962 Mad 99; *Nurjahan Khatun v. Asia Khatun*, AIR 1932 Cal 216; *Narayan Vasudevacharya v. Amgauda Malagauda*, AIR 1921 Bom 169.

89. *Ismail Ali v. F.M. Visvanadan*, AIR 1915 LB 97 (1); *T.L. Jagannatha v. B.H. Krishna*, AIR 1962 Mad 99; (1961) 2 MLJ 509; *Rahim Bux v. Nundo Lal*, ILR (1887) 14 Cal 321.

90. Art. 127, Limitation Act, 1963, see also *Kishori Devi v. Ram Narain*, (1969) 1 SCWR 133.

91. *Mohan Lal v. Hari Prasad*, (1994) 4 SCC 177 at pp. 179-80; *P.K. Unni v. Nirmala Industries*, (1990) 2 SCC 378.

92. Proviso to R. 92(2).

93. *Charn Chandra Ghosh v. Rai Behari Lal*, AIR 1925 Cal 157; *Kanda Veloo v. Kumaran Govindan*, AIR 1953 TC 529.

94. Or. 43 R. 1(j).

95. R. 90; see also *Lakshmiratan Engg. Works Ltd. v. Commr. (Judicial), Sales Tax*, AIR 1968 SC 488 at p. 492; (1968) 1 SCR 505; *Hindusthan Commercial Bank Ltd. v. Punnu Sahu*, (1971) 3 SCC 124; AIR 1970 SC 1384; *Desh Bandhu Gupta v. N.L. Anand*, (1994) 1 SCC 131 at p. 150; *Prakash Kaur v. Sandhooran*, (1993) 3 SCC 312.

96. *Desh Bandhu Gupta v. N.L. Anand*, (1994) 1 SCC 131 at p. 150. 1993 AIR SCW 3458.

(ii) *Who may apply?*—The following persons have been judicially held entitled to apply under this rule:

- (i) the decree-holder;
- (ii) the auction-purchaser;
- (iii) any person entitled to share in a rateable distribution of assets;
- (iv) any person whose interests are affected by the sale, e.g. a judgment-debtor, legal representatives of a deceased judgment-debtor, a real owner of the property sold in execution of a decree against his *benamidar*; where the judgment-debtor is a minor, his guardian; where the judgment-debtor is a ward of court, court of wards; a purchaser from the judgment-debtor *pendente lite*, etc.

(iii) *Grounds.*—Before a sale can be set aside under this rule, it must be shown that:

- (1) there has been a material irregularity or fraud in publishing and conducting the sale; and
- (2) substantial injury has been caused to the applicant.<sup>97</sup>

### (1) *Material irregularity*

The expression “*material irregularity*” in Rule 90 refers to an irregularity on the part of the court or its officers in the procedure to be followed before the property is put up for sale.<sup>98</sup> The following irregularities have been held to be material irregularities within the meaning of Rule 90:

- (i) omission to issue notice under Rule 22;
- (ii) omission to publish sale proclamation under Rule 66;
- (iii) omission to mention prior encumbrances in proclamation under Rule 66;
- (iv) omission to state the revenue or rent payable on the land;
- (v) omission to beat drum;
- (vi) omission to give survey number of the property;
- (vii) omission to hold sale at stated time and place;
- (viii) sale after an order of stay of execution;
- (ix) sale after satisfaction of the decree;
- (x) default in payment of deposit under Rule 84 or balance of purchase price under Rule 85, etc.

97 *Laxmi Devi v Mukand Kanwar*, AIR 1965 SC 834 at p 837 (1965) 1 SCR 726. *Desh Bandhu Gupta v N.L. Anand* (1994) 1 SCC 131. *Satvanarayana Bajoria v Ramalingam Tibrewal*, AIR 1952 Mad 86 (FB). *Kadiyala Rama Rao v Gutala Kahna Rao* (2000) 3 SCC 87.

98 *Ukaiappaligal Munnai (Firm) v V Ganesan* (1966) 2 MLJ 90. *Margaret A Skinner v Empire Store* (1976) 78 PIR 64. *Mahadeo Ram v Mohan Vikram Sah*, AIR 1933 Pat 435. *Ghisulal v Sukanrai* 1963 Raj LW 99.

The following irregularities, on the other hand, have been held not to be material irregularities under Rule 90:

- (i) absence of, or defect in attachment;<sup>99</sup>
- (ii) omission to mention exact time of sale in sale proclamation;
- (iii) omission to record reasons for adjournment of sale;
- (iv) omission to specify share of the judgment-debtor in the property;
- (v) omission to give notice to a receiver when he is not in possession of property;
- (vi) omission to send a copy of the decree to the executing court;
- (vii) misdescription of the property in sale proclamation when the parties knew the property to be sold;
- (viii) omission to mention value of the property;
- (ix) omission to issue a fresh proclamation after sale is adjourned;
- (x) any other ground which the applicant could have taken on or before the sale proclamation was drawn up,<sup>100</sup> etc.

There is a distinction between irregularity and material irregularity in conducting the sale and it must be established that by reason of illegality or irregularity in conducting the sale, the judgment-debtor has sustained substantial injury.<sup>101</sup>

Rule 22-A of Order 21 declares that where any property is sold in execution of a decree, the sale shall not be set aside merely on the ground that the judgment-debtor had died between the date of issuance of proclamation of sale and the date of sale and the legal representatives of such judgment-debtor were not brought on record. The court may, however, set aside such sale if it is satisfied that the legal representatives of the judgment-debtor were prejudiced.<sup>102</sup>

## (2) *Fraud*

"Fraud" means that "which is dishonest and morally wrong".<sup>103</sup> Such fraud must be in publishing or conducting the sale. Fraud must be established beyond reasonable doubt by clear and cogent evidence; general and vague allegations and suspicious circumstances are not enough.<sup>104</sup>

99. Expln. to R. 90, see also *Dhirendra Nath v. Sudhir Chandra*, AIR 1964 SC 1300 (1964) 6 SCR 1001, *S.A. Sundararajan v. A P.V. Rajendran*, (1981) 1 SCC 719 AIR 1981 SC 693; *Satyanarayana Bajoria v. Ramalingam Tibrewal*, AIR 1952 Mad 86 (FB); *Desh Bandhu Gupta v. N.L. Anand*, (1994) 1 SCC 131: 1993 AIR SCW 3458.

100. Sub-r. (3) of R. 90, *Desh Bandhu Gupta v. N.L. Anand*, (1994) 1 SCC 131: 1993 AIR SCW 3458.

101. *Desh Bandhu Gupta v. N.L. Anand*, (1994) 1 SCC 131: 1993 AIR SCW 3458.

102. *Mobarak Ali v. Dinabandhu Sahu*, AIR 1953 Ori 296, *Yeturu Dasaratharami v. Yeturu Pajjamma*, AIR 1979 AP 111.

103. *Paresh Nath v. Hari Charan*, ILR (1911) 38 Cal 622 at p. 626.

104. *Satish Chandra v. Kumar Satish Kantha*, AIR 1923 PC 73: 171 IC 391. (1924) 39 Cal LJ 165 (PC); *Hansraj Gupta v. Dehra Dun-Mussoorie Electric Tramway Co. Ltd.*, AIR 1940

Though the onus of proving fraud is on the party alleging it, it is open to a court to draw an inference of fraud from the established facts taken together as a whole.<sup>105</sup>

It is, however, not necessary that the auction-purchaser should also be a party to the fraud. It is sufficient if fraud on the part of the decree-holder is established. A mere understanding between intending purchasers agreeing not to bid against one another is not by itself objectionable and unlawful. But if such an agreement has been arrived at with a dishonest intention and oblique motive with a view to prevent the best price from being obtained, it would be fraudulent and invalid.<sup>106</sup>

As held by the Privy Council,<sup>107</sup> wherever a sale is impeached on the ground of fraud, a difference must be made between an innocent purchaser and one tainted by fraud which has brought about the execution sale. "The question is, in the former case, which of the two innocent parties shall suffer; in the latter, whether he who has wronged the other party shall be allowed to enjoy the fruits of his wrongdoing. A Court exercising equitable jurisdiction may withhold its hands in the one case and yet set aside the sale with or without terms in the other."<sup>108</sup> (emphasis supplied)

In the leading case of *Satish Chandra v. Kumar Satish Kantha*<sup>109</sup>, the Privy Council rightly observed:

"Charges of fraud and collusion ... must, no doubt, be proved by those who make them, proved by established facts or inferences legitimately drawn from those facts taken together as a whole. Suspicions and surmises and conjectures are not permissible substitutes for those facts or those inferences, but that by no means requires that every puzzling article or contrivance resorted to by one accused of fraud must necessarily be completely unravelled and cleared up and made plain before a verdict can be properly found against him. If this were not so, many a clever and dexterous knave would escape."<sup>110</sup> (emphasis supplied)

### (3) Substantial injury

A sale cannot be set aside by mere irregularity or fraud in publishing or conducting the same. The applicant must also prove that he had

PC 98, *A L N Narayanan Chettyar v High Court Rangoon*, AIR 1941 PC 93; *Brinhabala Das v Radha Kamal Das*, AIR 1969 Ori 63, *A V Papayya Sastry v Govt. of A P.* (2007) 4 SCC 221; AIR 2007 SC 1546

105 *Ibid*

106. *Mohd. Mira Ravuthar v Savvasi Vijaya*, ILR (1900) 23 Mad 227 at pp 233-34 (PC); *Ram Rihan v Razia Begam*, AIR 1943 Pat 88 at p 96

107 *Lalla Bunsedhur v Koonneur Bindeserec Dutt*, (1866) 10 Moo IA 454 (PC)

108 *Ibid.* at p 474

109 AIR 1923 PC 73 171 IC 391 (1924) 39 Cal LJ 165 (PC)

110 *Ibid.* at p 76 (AIR) at p 171 (CLJ) (per Lord Atkinson)

sustained substantial injury by reason of such irregularity or fraud.<sup>111</sup> Mere loss is not enough, it must be substantial. Mere inadequacy of price is not a good ground to set aside a sale. A court sale is a forced sale and, notwithstanding the competitive element of public auction, the best price is often not forthcoming. The judge must keep a certain margin for this factor. The court must apply its mind to all material factors bearing on the reasonableness of the price and conduct the sale.<sup>112</sup> If the price is substantially inadequate, there is both material irregularity and injury.<sup>113</sup> Since the burden of proving substantial injury is on the applicant, it should be alleged in the application.<sup>114</sup>

Sometimes, however, there may not be express allegations and the same may appear to be implicit from all the facts and circumstances alleged.<sup>115</sup> Whether or not the injury suffered by the applicant is substantial depends upon the facts of each case.<sup>116</sup> It should not be confined to pecuniary loss and, therefore, mere inadequacy of price is no proof of substantial injury though it is one of the relevant factors to be considered.<sup>117</sup>

(4) *Limitation*<sup>118</sup>

(5) *Notice*<sup>119</sup>

(6) *Appeal*<sup>120</sup>

(III) Judgment-debtor having no saleable interest: Rule 91

(i) *Nature and scope.*—Rule 91 enables the auction-purchaser to apply for setting aside the sale on the ground that the judgment-debtor had

111. *Laxmi Devi v. Mukand Kanwar*, AIR 1965 SC 834 at p. 837; (1965) 1 SCR 726; *Jaswantlal Natvarlal v. Sushilaben Manilal*, 1991 Supp (2) SCC 691 at pp. 692-93; AIR 1991 SC 770 at p. 771.

112. *Janak Raj v. Gurdial Singh*, AIR 1967 SC 608; (1967) 2 SCR 77; *Navalkha & Sons v. Ramanya Das*, (1969) 3 SCC 537; AIR 1970 SC 2037; *Kayjay Industries (P) Ltd. v. Asnew Drums (P) Ltd.*, (1974) 2 SCC 213; AIR 1974 SC 1331; *Desh Bandhu Gupta v. N.L. Anand*, (1994) 1 SCC 131; 1993 AIR SCW 3458.

113. *Kayjay Industries (P) Ltd. v. Asnew Drums (P) Ltd.*, (1974) 2 SCC 213, at pp. 219-20 (SCC); *Desh Bandhu Gupta v. N.L. Anand*, (1994) 1 SCC 131 at p. 150 (SCC).

114. *Putti Kondala Rao v. Vellamanchili Sitarattamma*, (1976) 1 SCC 712 at p. 715; AIR 1976 SC 737 at p. 739.

115. *Laxmi Devi v. Mukand Kanwar*, AIR 1965 SC 834 at pp. 838-39 (AIR); *Kayjay Industries (P) Ltd. v. Asnew Drums (P) Ltd.*, (1974) 2 SCC 213 at pp. 219-20; AIR 1974 SC 1331 at pp. 1334-35.

116. *Laxmi Devi v. Mukand Kanwar*, AIR 1965 SC 834 at pp. 838-39 (AIR); *Putti Kondala Rao v. Vellamanchili Sitarattamma*, (1976) 1 SCC 712.

117. *Radhey Shyam v. Shyam Behari*, (1970) 2 SCC 405; AIR 1971 SC 2337; *Kayjay Industries (P) Ltd. v. Asnew Drums (P) Ltd.*, (1974) 2 SCC 213, *Navalkha & Sons v. Ramanya Das*, (1969) 3 SCC 537 at pp. 540-41; AIR 1970 SC 2037 at p. 2039.

118. See *supra*, under that head.

119. See *supra*, under that head.

120. See *supra*, under that head.

no saleable interest in the property. This provision is an exception to the general rule of *caveat emptor* (let the buyer beware).<sup>121</sup>

(ii) *Object*.—The rule is intended for the protection of an innocent auction-purchaser; and it cannot, therefore, be invoked where the purchaser knew at the time of sale that the judgment-debtor had no saleable interest in the property.<sup>122</sup>

(iii) *Who may apply?*—It is only the auction-purchaser who can apply under this rule.<sup>123</sup> A decree-holder auction-purchaser can also apply.<sup>124</sup> A judgment-debtor cannot apply under this rule.<sup>125</sup>

(iv) *Saleable interest*.—The expression “no saleable interest” means *no saleable interest at all*.<sup>126</sup> Hence, where the judgment-debtor has *some* saleable interest, however small it may be, this rule does not apply and the sale cannot be set aside on the ground that the judgment-debtor did not have *full* saleable interest in the property.<sup>127</sup>

(v) *Limitation*<sup>128</sup>

(vi) *Notice*<sup>129</sup>

(vii) *Appeal*<sup>130</sup>

### (g) Effect of setting aside sale: Rule 93

Where a sale of immovable property has been set aside, the purchaser is entitled to refund of the purchase money paid by him with or without interest as ordered by the court.<sup>131</sup> An application under this rule can be filed within three years from the date of the order setting aside the sale.<sup>132</sup>

121. *Ahmedabad Municipal Corpn. v. Haji Abdulgafur*, (1971) 1 SCC 757 at pp. 759-60; AIR 1971 SC 1201 at pp. 1202-03.

122. *Kumarasami Chetti v. T.R. Subramania*, AIR 1958 Mad 671; *Bajjnath Marwari v. Bhutto Krishna Ray*, AIR 1933 Pat 684, 145 IC 929.

123. *Kumarasami Chetti v. T.R. Subramania*, AIR 1958 Mad 671.

124. *Ram Gopal v. Ram Kunwar*, AIR 1935 All 910, *Muthukumarasamia v. Muthusami*, AIR 1927 Mad 394, *T. Keshavan v. Bipathumma*, AIR 1935 Mad 340.

125. *Umed v. Jas Ram*, ILR (1907) 29 All 612.

126. *Munna Singh v. Gajadhar Singh*, ILR (1883) 5 All 577 (FB), *Ahmedabad Municipal Corpn. v. Haji Abdulgafur* (1971) 1 SCC 757 at p. 759; AIR 1971 SC 1201 at p. 1203.

127. *Ram Coomar v. Shushee Bhooshun*, ILR (1883) 9 Cal 626, *Ouseph Ouseph v. Devasia Chacko*, AIR 1953 Trav-Co 619, *Narasingi Vannechand v. Suyadevara Narasavva*, AIR 1945 Mad 363.

128. See *supra*, under that head.

129. See *supra*, under that head.

130. See *supra*, under that head.

131. R. 93, see also *Hindi Pracharak Prakashan v. G.K. Bros.*, 1993 Supp (1) SCC 419; AIR 1990 SC 2221; *Chinnammal v. P. Arumugham*, (1990) 1 SCC 513; AIR 1990 SC 1828.

132. Art. 137, Limitation Act, 1963.

**(h) Confirmation of sale: Rule 92**

No sale of immovable property shall become absolute until it is confirmed by the court. Where no application to set aside the sale is made under Rule 89, 90 or 91 or where such application is made and is disallowed by the court, the court shall make an order confirming the sale, and thereupon the sale shall become absolute.<sup>133</sup> Once the order is made under Rule 92 confirming the sale, the title of the auction-purchaser relates back to the date of sale.<sup>134</sup>

While confirming a sale, the court must adopt a practical and realistic approach. It may consider the fair value of the property, the general economic trends, the large sum required to be produced by the bidder, the formation of a syndicate, the futility of postponements and the possibility of litigation and several other factors dependent on the facts of each case.<sup>135</sup>

No speaking order is necessary. *If the Court has fairly, even if silently, applied its mind to the relevant considerations before it while accepting the final bid, no probe in retrospect is permissible. Otherwise a new threat to a certainty of court sales will be introduced.*<sup>136</sup> (emphasis supplied)

Proviso to sub-rule (1) of Rule 92 as added by the Amendment Act of 1976 enacts that where a claim against an attachment in execution of a decree has been made but the property attached has been sold pending the determination of such claim, the sale should not be confirmed by the court before the final disposal of such claim.<sup>137</sup>

**(i) Certificate of sale: Rule 94**

After the sale has become absolute, the court shall grant a certificate in favour of the purchaser. It shall bear the date on which the sale became

133. R 92(1). See also *Janak Raj v. Gurdial Singh*, AIR 1967 SC 608: (1967) 2 SCR 77; *Navalkha & Sons v. Ramanya Das*, (1969) 3 SCC 537; *Sardar Govindrao Mahadik v. Devi Sahai*, (1982) 1 SCC 237; AIR 1982 SC 989; *Desh Bandhu Gupta v. N.L. Anand*, (1994) 1 SCC 131; *Municipal Corpn. of Delhi v. Pramod Kumar*, (1991) 1 SCC 633; AIR 1991 SC 401; *Challamane Huchha Gowda v. M.R. Tirumala*, (2004) 1 SCC 453; *M.V. Janardan Reddy v. Vijaya Bank*, (2008) 7 SCC 738

134. S. 65; see also *Sagar Mahila Vidyalaya v. Pandit Sadasiv Rao*, (1991) 3 SCC 588 at pp. 595-98; AIR 1991 SC 1825.

135. *Kayjay Industries (P) Ltd. v. Asnew Drums (P) Ltd.*, (1974) 2 SCC 213 (220): AIR 1974 SC 1331 (1335).

136. *Kayjay Industries (P) Ltd. v. Asnew Drums (P) Ltd.*, (1974) 2 SCC 213 at p. 220: AIR 1974 SC 1331 at p. 1335; *Desh Bandhu Gupta v. N.L. Anand*, (1994) 1 SCC 131: 1993 AIR SCW 3458.

137. Statement of Objects and Reasons, Law Commission's Fifty-fourth Report at p. 207.

absolute and also specify the property sold and the name of the purchaser.<sup>138</sup> Such certificate is conclusive in nature.<sup>139</sup>

Issuance of a certificate is merely a formal declaration by the court and neither extinguishes nor creates any title. The object of such a certificate is to avoid any controversy regarding the identity of the property sold and the purchaser thereof and the date when the sale became absolute.<sup>140</sup> Issuance of a certificate is a ministerial act.<sup>141</sup>

#### (j) Effect of sale: Section 65

After the sale has become absolute, the property shall be deemed to have vested in the purchaser from the date when it is sold and not from the date when the sale becomes absolute.<sup>142</sup> In other words, the purchaser's title relates back to the date of the sale and not the confirmation of sale.<sup>143</sup>

138. R 94. See also *Sardar Govindrao Mahadik v Devi Sahai*, (1982) 1 SCC 237. AIR 1982 SC 989. *Desh Bandhu Gupta v. N L Anand*, (1994) 1 SCC 131.

139. *P Udayani Devi v V.V. Rajeshwara*, (1995) 3 SCC 252.

140. *Municipal Corpn. of Delhi v. Pramod Kumar*, (1991) 1 SCC 633 at p. 636. AIR 1991 SC 401.

141. *Sagar Mahila Vidyalaya v. Pandit Sadasiv Rao*, (1991) 3 SCC 588 at p. 598. AIR 1991 SC 1825.

142. S 65. See also, S 66.

143. *Janak Raj v. Gurdial Singh*, AIR 1967 SC 608 (1967) 2 SCR 77.

# CHAPTER 11

## Delivery of Property

### SYNOPSIS

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### 1. GENERAL

Rules 79 to 81 lay down mode of procedure for delivery of movable property. Likewise, Rules 95 and 96 prescribe mode of delivery of immovable property. Section 74 and Rules 97 to 106 deal with resistance or obstruction to delivery of possession to decree-holders and auction-purchasers.

Prior to Amendment Act, 1976, Rules 97 to 103 (like Rules 58 to 63) of Order 21 enabled the executing court to investigate claims and objections "summarily". But the position has been radically changed after the Amendment Act, 1976. Now the executing Court undertakes (i) full and complete inquiry into the right, title and interest of the parties to the proceeding or their representatives, and (ii) the orders passed in such inquiry amount to "decree" under Section 2(2) of the Code.

### 2. DELIVERY OF PROPERTY: RULES 79-81, 95-96

Delivery of property in execution of decrees may be effected in the following manner:

<i>Kinds of Property</i>	<i>Mode of Delivery</i>
(a) <i>Movable property:</i>	
(i) Movable property actually seized;	By delivering it to the purchaser. <sup>a</sup>
(ii) Movable property in possession of any person other than the judgment-debtor;	By giving notice to the person in possession prohibiting him from delivering possession to any person except the purchaser. <sup>b</sup>
(iii) Debt not secured by a negotiable instrument;	By an order prohibiting the creditor from receiving the debt or any interest thereon and the debtor from paying it to any person except the purchaser. <sup>c</sup>
(iv) Share in a corporation;	By an order prohibiting (a) the shareholder from transferring it to any person except the purchaser, or receiving dividend or interest thereon, and (b) the officers of the corporation from permitting such transfer or making payment to any person except the purchaser. <sup>d</sup>
(v) Negotiable instruments and shares;	By executing a document or making an endorsement in the prescribed form transferring in favour of the purchaser. <sup>e</sup>
(vi) Any other property not otherwise provided for;	By an order vesting such property in the purchaser. <sup>f</sup>
(b) <i>Immovable property:</i>	
(i) Immovable property occupied by the judgment-debtor or any person claiming under him;	By putting the purchaser in possession and removing any person who refuses to vacate it. <sup>g</sup>
(ii) Immovable property occupied by a tenant or other person;	By affixing a copy of the sale certificate in a conspicuous place on the property and proclaiming to the occupant that the interest of the judgment-debtor has been transferred to the purchaser. <sup>h</sup>

<sup>a</sup> R 79(1).<sup>b</sup> R. 79(2).<sup>c</sup> R. 79(3).<sup>d</sup> R. 79(3).<sup>e</sup> R 80.<sup>f</sup> R. 81.<sup>g</sup> R 95.<sup>h</sup> R 96, see also *Dev Raj v Gyan Chand*, (1981) 2 SCC 675 AIR 1981 SC 981, *Jaswantlal Natvarlal v Sushilaben Manilal*, 1991 Supp (2) SCC 691; AIR 1991 SC 770.

### 3. RESISTANCE TO DELIVERY OF POSSESSION: RULES 97-103

#### (a) Nature and scope

Section 74 and Rules 97 to 103 of Order 21 deal with resistance to delivery of possession to decree-holders or auction-purchasers. The general scheme of these rules has been altered on the lines of the amendments made in Rules 58-63. These amendments carry out the recommendations made by the Law Commission.<sup>1</sup>

<sup>1</sup> Law Commission's Fourteenth Report at pp 453-54, Law Commission's Twenty-seventh Report at pp. 208-09

The important changes are: (i) the executing court should undertake a full and complete inquiry and not merely a summary inquiry; and (ii) the orders passed in such inquiry are to be treated as decrees under Section 2(2).<sup>2</sup>

### (b) Rules 97-106: Scheme

After the Amendment Act, 1976, scheme relating to resistance to delivery of possession of property to decree-holder or auction-purchaser is as under:

Rule 97 enables the decree-holder or auction-purchaser to apply to executing court if he is resisted or obstructed in obtaining possession of such property by "any person". The court on receipt of such application proceeds to adjudicate it. Rule 101 requires the court to make full-fledged inquiry and determine all question relating to right, title and interest in the property arising between the parties to the proceeding or their representatives. The court will then pass an order upon such adjudication (Rule 98).

Rule 99 permits any person other than the judgment-debtor who is dispossessed by the decree-holder or auction-purchaser to make an application to executing court complaining such dispossession. The court on receipt of such application proceeds to adjudicate it (Rule 100). Rule 103 declares that an order passed under Rule 98 or 100 would be deemed to be a decree. Rule 104 saves pending proceedings. Rule 102 clarifies that Rules 98 and 100 do not apply to transferee *pendente lite* (as the doctrine of *lis pendens* applies to such cases). Rule 105 empowers executing court to dismiss an application for default or to pass *ex-parte* order thereon. Rule 106 authorises executing court to set aside orders passed under Rule 105 on sufficient cause being shown for non-appearance at the time of hearing of application.

Parliament has thus conferred very wide and extensive powers on the executing court and Rules 97 to 106 are in the nature of "complete Code" dealing with all issues relating to resistance or obstruction to delivery of possession to decree-holders or auction-purchasers.

### (c) Application by decree-holder or auction-purchaser: Rule 97

Where a decree-holder or auction-purchaser of immovable property is resisted or obstructed by any person in obtaining possession of such

2. Statement of Objects and Reasons; see also *Noorduddin v. Dr. K.L. Anand*, (1995) 1 SCC 242; *Babulal v. Raj Kumar*, (1996) 3 SCC 154; AIR 1996 SC 2050.

property, he may make an application to the court complaining of such resistance or obstruction.<sup>3</sup>

**(d) Application by any other person: Rule 99**

Where any person other than the judgment-debtor is dispossessed of immovable property by the decree-holder or auction-purchaser, he may make an application to the court complaining of such dispossession.<sup>4</sup>

**(e) Hearing of application: Rules 105-106**

Rules 105 and 106 are new. Rule 105 empowers the court to dismiss an application for default of appearance by the applicant or to pass *ex parte* order when the opposite party does not appear in spite of notice to him. Rule 106 enables the court to set aside orders passed under Rule 105, if the party adversely affected by such order shows sufficient cause for his non-appearance when the application was called on for hearing.

**(f) Inquiry and adjudication: Section 74;  
Order 21 Rules 97-101**

The court shall on receipt of an application under Rule 97 proceed to adjudicate upon the application in accordance with Rule 101.<sup>5</sup> The court will hold a full-fledged inquiry and determine all questions including the questions relating to right, title or interest in the property arising between the parties to the proceeding or their representatives.<sup>6</sup>

In accordance with such determination the court shall, either (a) allow the application of the decree-holder or auction-purchaser directing that the applicant be put into possession of the property; or (b) dismiss the application; or (c) pass such order as it deems fit.<sup>7</sup>

Where the court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf or by any transferee, where such transfer was made during the pendency of the suit or execution proceeding, it shall order the applicant to be put into possession of property and if the applicant is resisted or obstructed even thereafter in obtaining possession, the court may at the instance of the applicant order the obstructor to be detained in civil prison up to 30 days.<sup>8</sup>

Similarly, on receipt of an application under Rule 99, the court shall proceed to adjudicate upon the application in accordance with Rule 101 and in accordance with such determination either (a) allow

3 R 97(1)

6 R 101.

4 R 99

7 R 98(1)

5 R 97(2)

8 S 74, R 98(2).

the application directing that the applicant be put into possession of the property; or (b) dismiss the application; or (c) pass such order as it deems fit.<sup>9</sup>

### (g) Transferee pendente lite: Rule 102

Rule 102 provides that nothing in Rules 98 and 100 shall apply to resistance or obstruction in execution of a decree for possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

The Explanation as added by the Amendment Act of 1976 now makes it clear that the "*transfer*" referred to in Rule 102 includes involuntary transfer (transfer by operation of law).<sup>10</sup>

### (h) Appeal: Rule 103

An order passed under Rule 98 or 100 shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.<sup>11</sup>

### (i) Pendency of suit: Rule 104

Rule 104 has been inserted to save pending suits in which orders under Rule 101 or 103 were passed. It enacts that every order under Rule 101 or 103 shall be subject to the result of any suit that may be pending on the date of commencement of the proceedings in which such order is made, if in such suit the party against whom the order is made has sought to establish a right which he claims to the present possession of the property.

9. R. 100.

10. Expln. to R. 102; see also *Usha Sinha v. Dina Ram*, (2008) 7 SCC 144.

11. R. 103.

# CHAPTER 12

## Distribution of Assets

### SYNOPSIS

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### 1. GENERAL

Section 73 of the Code provides for rateable distribution of proceeds of execution sale among two or more decree-holders. It provides that where the assets are held by a court and before the receipt of such assets, several decree-holders have applied to the court for execution of a decree for payment of money against the same judgment-debtor and have not obtained satisfaction, the assets, after deducting the costs of realisation, shall be rateably distributed among them.<sup>1</sup>

It allows filing of a suit for refund of assets wrongly distributed.<sup>2</sup>

The provision also confers priority of Government debts over private debts.<sup>3</sup>

1 S 73(1)  
2 S 73(2)  
3 S 73(3).

## 2. NATURE AND SCOPE

The rule enunciated in the section (Section 73) is a rule of procedure and provides cheap, speedy and expeditious mode of execution. It neither enlarges nor curtails substantive rights of the decree-holder.<sup>4</sup>

In *Shankar Sarup v. Mejo Mal*,<sup>5</sup> the Privy Council observed that the court distributing the assets is acting in administrative rather than in a judicial manner. It is merely a distributive agency and does not adjudicate rights between the parties.

## 3. ILLUSTRATIONS

Let us understand the principle by considering some cases on the point:

1. A obtains a decree against J in court C for Rs 10,000 and applies to the court for execution of his decree by attachment and sale of J's property. The property of J is attached. Thereafter B also obtains a decree against J in the same court for Rs 5000 and applies to that court for execution of his decree by attachment and sale of the same property attached in execution of A's decree. The property is thereafter sold by the court in execution of A's decree for Rs 7500. Under this section the said amount of Rs 7500 will be rateably distributed between both the decree-holders. A will be paid Rs 5000 and B will be paid Rs 2500.

2. In the above illustration, instead of A, the Government obtains a decree against J and the property is attached. Thereafter, B also obtains a decree against J. The property is sold in execution. The Government is entitled to recover its dues by claiming priority over B's dues. But if before the Government applies for payment, the amount is taken away by B, no priority can be claimed thereafter by Government.

## 4. OBJECT

The provision seeks to place all decree-holders on an equal footing regardless of priority in attachment or making of application for rateable distribution. It intends to secure equitable disposition of assets of the judgment-debtor among rival decree-holders without taking recourse to separate and independent proceedings.<sup>6</sup>

4. *Hoti Lal v. Chatura Prasad*, AIR 1941 All 110; 1941 All LJ 137 (FB); *Himatmal Devchand v. Abdul Hakke*, AIR 1945 Bom 76; *Ramzan Khan v. Seth Hiralal*, AIR 1961 Raj 118. ILR 1960 Raj 1510; *Hasoon Arra v. Jawadoonnissa*, ILR (1879) 4 Cal 29; *Gobardhan Dass v. Jang Bahadur*, AIR 1926 Oudh 616.

5. (1900-01) 28 IA 203; ILR (1901) 23 All 313 (PC)

6. *Supra*, n. 4; see also *Excise and Taxation Officer v. Gauri Mal Butali Trust*, AIR 1961 Punj 292 ILR 1960 Punj 809; *Commercial & Industrial Bank Ltd. v. Mir Sarfaraz Ali*, AIR 1956 Hyd 65; ILR 1956 Hyd 79 (FB); *Mohd. Jan v. Haji Abdul Sattar*, AIR 1971 Del 132.

The underlying object of this section is twofold; *firstly*, to prevent unnecessary multiplicity of execution proceedings; and *secondly*, to secure equitable distribution of property by placing all the decree-holders on the same footing.<sup>7</sup>

## 5. CONDITIONS

To entitle a decree-holder to claim a rateable distribution under this section, the following conditions must exist:

- (1) The applicant for rateable distribution must have obtained a decree and applied for execution of the decree to the appropriate court;
- (2) Such application should have been made prior to the receipt of the assets by the court;
- (3) The assets of which a rateable distribution is claimed must be assets held by the court;
- (4) The attaching creditor as well as the decree-holder claiming to participate in the assets should be holders of decrees for the payment of money; and
- (5) Such decrees should have been obtained against the same judgment-debtor.<sup>8</sup>

## 6. INTERPRETATION

Since Section 73 aims to secure equitable justice, it should be interpreted liberally. The court should consider the substance of the matter rather than the form of application.<sup>9</sup>

## 7. ASSETS AVAILABLE FOR RATEABLE DISTRIBUTION: ILLUSTRATIVE CASES

The following assets were held to be available for rateable distribution under Section 73:

7. *Bithal Das v. Nand Kishore*, ILR (1901) 23 All 106 at p. 110, *Hoti Lal v. Chatura Prasad*, AIR 1941 All 110, *Suraj Lal v. Krishna Das Padrama Raj Krishna Sugar Works Ltd.*, AIR 1961 All 371; *Mohd. Jan v. Haji Abdul Sattar*, AIR 1971 Del 132
8. *Palaniappa v. Muthu Veerappa*, AIR 1966 Mad 406 at p. 407, *V.T. Veerappa Chettiar v. P.S. Palaniappa Chettiar*, AIR 1973 Mad 313 at p. 315, *Biswambar v. Aparna Charan*, AIR 1935 Cal 290 (FB), *Kancharla Suryavathi v. Thota Suryakantham*, AIR 1984 AP 277
9. *Hoti Lal v. Chatura Prasad*, AIR 1941 All 110, *Himalmal Devchand v. Abdul Hakke*, AIR 1945 Bom 76, *Haseen Arfa v. Jawadoonnissa*, ILR (1879) 4 Cal 29, *Ramzan Khan v. Seth Hiratal*, AIR 1961 Raj 118, *Gobardhan Dass v. Jang Banadur*, AIR 1926 Oudh 616, *Bithal Das v. Nand Kishore*, ILR (1901) 23 All 106

- (i) Sale proceeds realised from auction-sale;
- (ii) Sale proceeds in the hands of decree-holder-purchaser;
- (iii) Deposit made by a defaulting purchaser;
- (iv) Salary of government servant under attachment;
- (v) Money deposited by surety to release attachment;
- (vi) Money paid in garnishee proceedings;
- (vii) Money paid in execution proceedings;
- (viii) Money paid under prohibitory order;
- (ix) Money paid to avoid attachment;
- (x) Money realised in execution of decree, etc.

### 8. ASSETS NOT AVAILABLE FOR RATEABLE DISTRIBUTION: ILLUSTRATIVE CASES

The following assets were, on the other hand, not held available for rateable distribution under this rule;

- (i) Deposit of earnest money;
- (ii) Money paid for removal of attachment;
- (iii) Money paid privately by judgment-debtor to decree-holder;
- (iv) Money paid by judgment-debtor to get himself relieved;
- (v) Money paid to decree-holder by surety;
- (vi) Money paid in court towards a decree against third party;
- (vii) Money paid as security;
- (viii) Money paid for a specific purpose, e.g. to avert arrest;
- (ix) Money deposited to set aside sale;
- (x) Money realised under attachment before judgment, etc.

### 9. COST OF REALISATION

The costs of realisation of assets should be paid in priority to other debts.<sup>10</sup>

### 10. MODE OF DISTRIBUTION

Rateable distribution should be made according to the amount due to each decree-holder at the time of the distribution of assets. Such order can be enforced by summary process of execution.<sup>11</sup>

10. Proviso (c) to S. 73(1); see also *M L. Abdul Jabbar v. M.V. Venkata Sastri & Sons*, (1969) 1 SCC 573; AIR 1969 SC 1147.

11. *Coop. Society, Central Bank v. Ganpat*, AIR 1935 Nag 214; *Kesheorao Balwantrao v. Mulchand Shekulal*, AIR 1937 Nag 383.

## 11. SUIT FOR REFUND

Sub-section (2) of Section 73 enacts that a suit lies for refund of assets wrongly distributed. Hence, any person who is entitled to all or any of the assets which have been paid to a person not entitled to them, may sue for the refund of the assets.<sup>12</sup> The cause of action for such suit arises when the amount is actually paid.<sup>13</sup> The period of limitation for such suit is three years from the date of payment.<sup>14</sup>

## 12. PRIORITY OF GOVERNMENT DEBTS

### (a) Nature and scope

Sub-section (3) of Section 73 confers priority of government debts over private debts. It is thus in the nature of a proviso to the rule in the main provision (i.e. Section 73).<sup>15</sup> It recognizes the English Common Law doctrine that Crown debts are entitled to priority.<sup>16</sup>

### (b) Object

The basic object of priority of government debts is that as a Sovereign, the State should be able to discharge its primary functions, for which it must get necessary funds. If priority is not granted to Government, it may not be able to perform those functions.<sup>17</sup>

In *Excise and Taxation Officer v. Gauri Mal Butali Trust*<sup>18</sup>, the High Court of Punjab stated:

12. *Shankar Sarup v. Mejo Mal*, (1900-01) 28 IA 203; ILR (1901) 23 All 313 (PC); *K. Srinivasa v. Noor Mohd. Rowther*, AIR 1970 Mad 504.
13. *Ram Chandra v. Raghunath Saran*, AIR 1918 All 327; *Hart v. Tara Prasanna Mukherji*, ILR (1885) 11 Cal 718.
14. Art 62, Limitation Act, 1963; see also *Shankar Sarup v. Mejo Mal*, (1900-01) 28 IA 203; ILR (1901) 23 All 313 (PC); *S T Pankajammal v. S. Sumbandamurthi Mudaliar*, AIR 1960 Mad 263; *Baiznath Lala v. Ramdas*, AIR 1915 Mad 405, *Sukh Raj Shah v. Pir Gauhar Shah*, AIR 1940 Pesh 36.
15. *State of U P v. Kotak & Co.*, AIR 1973 All 230.
16. *Henley & Co., Re*, (1878) 9 Ch D 469 (CA), *Builders Supply Corpn v Union of India*, AIR 1965 SC 1061 (1965) 2 SCR 289, *Collector of Aurangabad v Central Bank of India*, AIR 1967 SC 1831 (1967) 3 SCR 585, *Union of India v Somasundram Mills (P) Ltd.*, (1985) 2 SCC 40. AIR 1985 SC 407; *Kotak & Co. v. State of U P.*, (1987) 1 SCC 455. AIR 1987 SC 738, *Lakshman Swarup v. Union of India*, (1997) 7 SCC 245. For detailed discussion, see, *Authors' Code of Civil Procedure (Lawyers' Edn)* Vol. I at pp 1048-58.
17. *Builders Supply Corpn. v. Union of India*, AIR 1965 SC 1061, *Murli Tamiram v T Asoomal & Co.*, AIR 1955 Cal 423 (1955) 59 CWN 701. *Bank of India v John Bowman*, AIR 1955 Bom 305. ILR 1955 Bom 654. *Excise and Taxation Officer v Gauri Mal Butali Trust*, AIR 1961 Punj 292. ILR 1960 Punj 809, *Collector v Central Bank*, AIR 1967 SC 1831.
18. AIR 1961 Punj 292. ILR 1960 Punj 809.

"The Common Law doctrine, that if the debts due to the Crown are of equal degree to the debts due to a private citizen, then the Crown must have priority against the private citizen, is a part of the law of this country. *The preferential rights of the State in a democratic socialist republic are necessary, and raison d'être for such a privileged status given to the State, in view of its functions and duties, has to continue.*"<sup>19</sup> (emphasis supplied)

### (c) Constitutional validity

The provision relating to priority of government debts cannot be held *ultra vires*, arbitrary, discriminatory or unreasonable, violative of Article 14 or Article 19 of the Constitution.<sup>20</sup>

### (d) Procedure

The Government must make an application under Section 73(3) before the assets are paid over to the decree-holder.<sup>21</sup> If, however, the State does not choose to apply to the court for payment of its dues from the amount lying as deposit in the court and allows the amount to be taken away by some other decree-holder, it cannot, thereafter, make an application for payment of its dues from the sale proceeds since *there is no amount left with the court to be paid to the State.*<sup>22</sup> (emphasis supplied)

### (e) Determination of claim

As soon as the question of rateable distribution is determined, the rights of the parties are crystallised. Nothing further remains to be done thereafter except to carry out the order for distribution made by the court. If the State lays its claim after an order is made by the court, it will be of no avail as the property has gone beyond the reach of the State, it having ceased to be the property of the judgment-debtor against whom the State had a claim. *No question of priority can arise in that situation, the State having missed the bus.*<sup>23</sup>

But if the State had already affected an attachment of the property, which was sold even before its sale, the State would be entitled to recover the sale proceeds from whoever has received the amount from

19. *Ibid*, at p. 295 (AIR) (*per Tek Chand, J.*).

20. *Murli Tahilram v. T. Asoomal & Co.*, AIR 1955 Cal 423 at p. 428-29; (1955) 59 CWN 701; *New South Wales Taxation Commr. v. Palmer*, 1907 AC 179 (PC), *Builders Supply Corpn. v. Union of India*, AIR 1965 SC 1061, *Collector, Tiruchirapalli v. Trinity Bank*, AIR 1962 Mad 59 (FB).

21. *State of U.P. v. Kotak & Co.*, AIR 1973 All 230; *Somasundaram Mills (P) Ltd. v. Union of India*, AIR 1970 Mad 190; *Union of India v. Somasundram Mills (P) Ltd.*, (1985) 2 SCC 40; AIR 1985 SC 407; *Basanta Kumar v. Panchu Gopal*, AIR 1956 Cal 23.

22. *Union of India v. Somasundram Mills (P) Ltd.*, (1985) 2 SCC 40 at p. 42. AIR 1985 SC 407.

23. *Kotak & Co. v. State of U.P.*, (1987) 1 SCC 455 at p. 458. AIR 1987 SC 738.

the court by filing a suit.<sup>24</sup> The prior attachment fastens itself to the proceeds of a sale pursuant to the later attachment.<sup>25</sup> The prior attachment affected by the State similarly fastens itself to the sale proceeds taken away by the decree-holder. The State is, therefore, entitled to recover the amount from the decree-holder who has taken away the amount.<sup>26</sup>

#### (f) Commercial activities of Government

The modern State is no more a "police State". It has increased its powers and functions. It has enlarged its activities. It has chosen to engage itself in acquiring and holding property, in doing business, in running commercial undertakings, in providing transport and in a thousand other ways in doing the work which in the recent past was done by private citizens. In such activities, the doctrine of priority of Crown debts should not be invoked.<sup>27</sup>

#### (g) Waiver

Though commencing as an attribute of monarchical Government, the doctrine of Crown prerogative has been accepted in democratic countries as well. It is, however, open to the State to divest itself of that right by waiver. Similarly, it may be abrogated by a statute.<sup>28</sup>

#### (h) Conclusions

It is submitted that the following observations of Leach, C.J. in *Manickam v. ITO, Madras*<sup>29</sup> lay down correct law on the point. Speaking for the Full Bench of the High Court of Madras, the learned Chief Justice stated:

"It cannot be denied that the Crown has the right of priority in payment of debts due to it. It is a right which has always existed and has been repeatedly recognised in India. If the Crown is entitled as it is, to prior payment over all unsecured creditors, the position of secured creditor does not rise. I see no reason why the Crown should not be allowed to apply to the Court for an order directing its debt to be paid out of moneys in Court belonging to the debtor, without having to file a suit. Of course, it must be debt which is not disputed or is indisputable"<sup>30</sup> (emphasis supplied)

24. *Union of India v. Somasundram Mills (P) Ltd.*, (1985) 2 SCC 40 at p. 42 AIR 1985 SC 407

25. *Zumberlal v. Sitaram*, AIR 1937 Nag 80 (per Vivian Bose, J.)

26. *Union of India v. Somasundram Mills (P) Ltd.*, (1985) 2 SCC 40 at p. 43 AIR 1985 SC 407 at p. 409

27. *Murti Tahilram v. T. Asommal & Co.*, AIR 1955 Cal 423 at p. 429 (1955) 50 CWN 701

28. *Excise and Taxation Officer v. Gauri Mal Butah Trust* AIR 1961 Punj 292 ILR 1960 Punj 809

29. AIR 1938 Mad 360 ILR 1938 Mad 744 (1938) 1 MLJ 351 (FB)

30. *Ibid.* at p. 363 (AIR)

### 13. APPEAL

Prior to the amendment of the definition of decree in Section 2(2) by the Amendment Act of 1976, an order made under this Section was appealable as a "decree" where the conditions of Section 47 were satisfied.<sup>31</sup> However, after deletion of the word and figure "Section 47" from the definition of "decree" in Section 2(2) by the Amendment Act of 1976, the order passed under Section 73 is not appealable as a decree.<sup>32</sup>

### 14. REVISION

Since after the Amendment Act of 1976, an order under Section 73 does not amount to a decree and is not appealable, a revision application can be filed against the said order provided the conditions laid down in Section 115 are satisfied.<sup>33</sup>

### 15. CONCLUDING REMARKS

From the above discussion, it clearly appears that Order 21 of the Code of Civil Procedure contains elaborate and exhaustive provisions for execution of decrees and orders, takes care of different types of situations and provides effective remedies not only to the decree-holders and judgment-debtors but also to objectors and third parties. In exceptional cases, where provisions are rendered ineffective or incapable of giving relief to an aggrieved party, he can file a suit in a civil court.

The discussion can well be concluded with the following observations of Sharma, J. (as he then was) in *Ghan Shyam Das v. Anant Kumar Sinha*:<sup>34</sup>

"The remedy under the Civil Procedure Code is of superior judicial quality than what is generally available under other statutes, and the judge being entrusted exclusively with administration of justice, is expected to do better."<sup>35</sup>

31. *Hurmoozi Begum v. Ayasha*, AIR 1921 Pat 401; *Shib Das v. Bulaki Mal & Sons*, AIR 1927 Lah 100; *Bishen Das v. Tulsi Shah & Sons*, AIR 1935 Lah 302, *Satyendra Nath v. Bibhuti Bhusan*, AIR 1963 Cal 104, *Lalchand v. Ramdayal*, AIR 1939 Bom 112; *Dwarkadas v. Jadab Chandra*, AIR 1924 Cal 801; *Union of India v. Somasundram Mills (P) Ltd.*, (1985) 2 SCC 40; AIR 1985 SC 407.

32. For detailed discussion, see *supra*, Pt. I, Chap. 2.

33. *Major S.S. Khanna v. Brig F.J. Dillon*, AIR 1964 SC 497; (1964) 4 SCR 409; *Suraj Lal v. Krishna Das Padrama Raj Krishna Sugar Works Ltd.*, AIR 1961 All 371; *Karpaga Nidhi Ltd. v. Vania Vilasa Nidhi Ltd.*, AIR 1925 Mad 587; *Har Narain v. Bird & Co.*, AIR 1936 Oudh 132; *Balakrishna Udayar v. Vasudeva Aiyar*, AIR (1916-17) 44 IA 261 AIR 1917 PC 71. For detailed discussion, see *supra*, Pt. III, Chap. 9.

34. (1991) 4 SCC 379; AIR 1991 SC 2251.

35. *Ibid*, at p. 383 (SCC): at p. 2254 (AIR); see also *Chinnammal v. P. Arumugham*, (1990) 1 SCC 513; AIR 1990 SC 1828, *Sardar Govindrao Mahadik v. Devi Sahai*, (1982) 1 SCC 237; AIR 1982 SC 989; *Janak Raj v. Gurdial Singh*, AIR 1967 SC 608; (1967) 2 SCR 77.



Part V  
Miscellaneous



# CHAPTER 1

## Transfer of Cases

### SYNOPSIS

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### 1. GENERAL

As a general rule, a plaintiff as *arbiter litis* or *dominus litis* has a right to choose his own forum where a suit can be filed in more than one court. Normally, this right of the plaintiff cannot be curtailed, controlled or interfered with.<sup>1</sup> But the said right is controlled by the power vested in superior courts to transfer a case pending in one inferior court to another or to recall the case to itself for hearing and disposal.

1. *Indian Overseas Bank v. Chemical Construction Co.*, (1979) 4 SCC 358, *Charan Lal Sahu v. Union of India*, AIR 1990 SC 1480 at p. 1519; *Arvee Industries v. Ratan Lal*, (1977) 4 SCC 363 at p. 365; *Hazara Singh v. State of Punjab*, AIR 1965 SC 720: (1964) 4 SCR 1; *Union of India v. Shiromani Gurdwara Prabandhak Committee*, (1986) 3 SCC 600. AIR 1986 SC 186; *Subramaniam Swamy v. Ramakrishna Hegde*, (1990) 1 SCC 4; *Maneka Sanjay Gandhi v. Rani Jethmalani*, (1979) 4 SCC 167 at p. 169; AIR 1979 SC 468 at p. 469; *Kulwinder Kaur v. Kandi Friends Education Trust*, (2008) 3 SCC 659; AIR 2008 SC 1333; *Durgesh Sharma v. Jayshree*, (2008) 9 SCC 648.

Sections 22 to 25 enact the law as regards transfer and withdrawal of suits, appeals and other proceedings from one court to another. Sections 22 and 23 enable a defendant to apply for transfer of a suit while Sections 24 and 25 empower certain courts to transfer any suit, appeal or other proceeding either on an application made by any party or by the court *suo motu*.<sup>2</sup> The provision of Sections 22-25 are exhaustive.<sup>3</sup>

## 2. OBJECT

The primary and paramount object of every procedural law is to facilitate justice. A fair and an impartial trial is a *sine qua non* and an essential requirement of dispensation of justice. Justice can only be achieved if the court deals with both the parties present before it equally, impartially and even-handedly. Hence, though a plaintiff has the right to choose his own forum, with a view to administer justice fairly, impartially, and even-handedly, a court may transfer a case from one court to some other court.<sup>4</sup>

## 3. NATURE AND SCOPE

Section 22 allows the defendant to make an application for transfer of a suit, whereas Section 23 indicates the court to which such an application can be made. Section 24 embodies general power of transfer of any suit, appeal or other proceeding at any stage either on an application of any party or by a court of its own motion. This power, however, does not authorise a High Court to transfer any suit, appeal or other proceeding from a court subordinate to that High Court to a court not subordinate to that High Court.<sup>5</sup> Section 25 confers very wide, plenary and extensive powers on the Supreme Court to transfer any suit, appeal or other proceeding from one High Court to another High Court or from one civil court in one State to another civil court in another State.<sup>6</sup>

## 4. WHO MAY APPLY?: SECTIONS 22-23

Sections 22 and 23 of the Code deal with the right of a defendant to apply for the transfer of a suit. Where the plaintiff has the choice of two or more courts in which he may institute a suit, a defendant, after notice to the other side, may at the earliest opportunity apply to a court

2 For detailed discussion see "Suo motu transfer" *infra*

3 *Durgesh Sharma v Jayshree*, (2008) 9 SCC 648

4 *Supra*, n. 1, see also *Pusnpa Devi v Jai Narain*, (1992) 2 SCC 676 AIR 1992 SC 1133

5 *Durgesh Sharma v Jayshree* (2008) 9 SCC 648

6 *Ibid*

to have the suit transferred from the court in which it is filed to another court.<sup>7</sup> In other cases, such application may be filed by any party to the suit, appeal or other proceeding.<sup>8</sup>

## 5. CONDITIONS

Before transfer is ordered under Section 22, two conditions must be satisfied, namely, (i) the application must be made at the earliest possible opportunity and in all cases, where issues are settled, at or before the settlement of issues; and (ii) notice must be given to the other side. The provision as to notice is mandatory. Such notice may be given by the party making an application or by the court.<sup>9</sup>

## 6. TO WHICH COURT APPLICATION LIES

The Code specifies the court to which an application for transfer can be made:

- (1) Where several courts having jurisdiction are subordinate to the same appellate court, an application for transfer can be made to that appellate court;<sup>10</sup>
- (2) Where such courts are subordinate to the same High Court, an application can be made to that High Court;<sup>11</sup> and
- (3) Where such courts are subordinate to different High Courts, an application can be made to the High Court within the local limits of whose jurisdiction, the court in which the suit is instituted is situate;<sup>12</sup>
- (4) The Supreme Court may transfer any suit, appeal or other proceeding from one High Court to another High Court, or from one Civil Court in the State to another Civil Court in any other State.<sup>13</sup>

7. Ss. 22, 23. See also *Manohar Lal Chopra v. Seth Hiralal*, AIR 1962 SC 527; 1962 Supp (1) SCR 450; *Jagatguru Shri Shankaracharya v. Ramji Tripathi*, AIR 1979 MP 50 at p. 56; *Manjari Sen v. Nirupam Sen*, AIR 1975 Del 42 at p. 44; (1974) 1 Del 135; *Shri Seetha Mahalakshmi Rice & Groundnut Oil Mills v. Rajesh Trading Co.*, AIR 1983 Bom 486 at p. 487.

8. Ss. 24, 25. See also *Lakshmi Narain v. ADJ*, AIR 1964 SC 489; (1964) 1 SCR 362; *Manjari Sen v. Nirupam Sen*, AIR 1975 Del 42.

9. *Manjari Sen v. Nirupam Sen*, AIR 1975 Del 42.

10. S. 23(1). 11. S. 23(2).

12. S. 23(3). This provision, however, has to be read keeping in view a recent decision of the Supreme Court in *Durgesh Sharma v. Jayshree*, (2008) 9 SCC 648.

13. S. 25; see also, Art. 139-A, Constitution of India, *Durgesh Sharma v. Jayshree*, (2008) 9 SCC 648.

## 7. APPLICATION: FORM

An application for transfer may be made by a party seeking transfer of a case by filing a petition supported by an affidavit setting forth the grounds of transfer. In an appropriate case, however, an affidavit in support of the application may be dispensed with.<sup>14</sup> But no specific form is prescribed by the Code.

## 8. GROUNDS

### (a) General rule

The plaintiff is *dominus litis* and as such he has the right to choose his own forum and, *normally*, this right of the plaintiff cannot be interfered with or curtailed either by the opposite party or by the court.<sup>15</sup>

### (b) Considerations

A court may transfer any suit, appeal or other proceeding keeping in view relevant and germane considerations. There is unanimity of opinion that balance of convenience is of prime consideration for transfer of a suit. The expression "balance of convenience" has inspired profound legal thought and has acquired the gloss of many judicial interpretations. Restated in simple terms it is a question of fact in each case. Balance of convenience is neither the convenience of the plaintiff alone nor of the defendant alone but of both. In determining the balance of convenience for the trial of a suit, the court has to take into consideration (1) convenience or inconvenience of the plaintiff and the right of the plaintiff to choose his own forum; (2) convenience or inconvenience of the defendant; (3) convenience or inconvenience of the witnesses required for a proper trial of the suit; (4) convenience or inconvenience of a particular place of trial having regard to the nature of the evidence

14. *Bishen Kaur v. Amar Nath*, (1912) 14 IC 561 (Lah); *Hardit Singh (Dr) v. Bhagat Jaswant Singh*, AIR 1964 Punj 277.

15. *Indian Overseas Bank v. Chemical Construction Co.*, (1979) 4 SCC 358 AIR 1979 SC 1514; *Charan Lal Sahu v. Union of India*, (1990) 1 SCC 613 at p. 668 AIR 1990 SC 1480 at p. 1519; *Arvee Industries v. Ratan Lal*, (1977) 4 SCC 363 at p. 365 AIR 1977 SC 2429 at p. 2431; *Hazara Singh v. State of Punjab*, AIR 1965 SC 720 (1964) 4 SCR 1; *Union of India v. Shiromani Gurdwara Prabandhak Committee*, (1986) 3 SCC 600 AIR 1986 SC 186; *Subramaniam Swamy v. Ramakrishna Hegde*, (1990) 1 SCC 4; *Maneka Sanjay Gandhi v. Rani Jethmalani*, (1979) 4 SCC 167 at p. 169 AIR 1979 SC 468 at p. 469; *Pushpa Devi v. Jai Narain*, (1992) 2 SCC 676 AIR 1992 SC 1133; *Ranbir Yadav v. State of Bihar*, (1995) 4 SCC 392 AIR 1995 SC 1219; *Kulvinder Kaur v. Kandi Friends Education Trust* (2008) 3 SCC 659 AIR 2008 SC 1333.

on the main points involved in the suit and also having regard to the doctrine of "*forum conveniens*"; and (5) nature of issues in the suit.<sup>16</sup>

### (c) Approach of court

The jurisdiction to transfer a case must be exercised with extreme care, caution and circumspection. The search should be for justice and the court must be satisfied that justice could more likely be done between the parties by refusing to allow the plaintiff to continue his suit in the forum of his own choice. A mere balance of convenience in favour of the proceedings in another court, *albeit a material consideration, may not always be a sure criterion justifying transfer*.<sup>17</sup>

In this jurisdiction, the approach of the court must be pragmatic, not theoretical. The amplitude of the expression "expedient in the interest of justice" furnishes a general guideline for the exercise of the power. Whether it is expedient or desirable in the interest of justice to transfer a case to another court is a question which depends upon the facts of each case.<sup>18</sup> The paramount consideration is the interest of justice and when the ends of justice demand transfer of a case, the court should not hesitate to act.<sup>19</sup>

## 9. NOTICE

When an application for transfer is made under Section 22, notice of such application must be given by the defendant to the other side. The words "after notice to the other parties" indicate that notice must be given prior to the making of application.<sup>20</sup> When an application is made

16. *Baburam Agarwalla v. Jamunadas Ramji & Co.*, AIR 1951 Cal 239 at p. 242; *Indian Overseas Bank v. Chemical Construction Co.*, (1979) 4 SCC 358, *Guda Vijayalakshmi v. Guda Ramachandra*, (1981) 2 SCC 646 at p. 650. AIR 1981 SC 1143 at pp. 1145-46; *Murray & Co. (P) Ltd v. Madanlal Poddar*, 1994 Supp (3) SCC 696, *Baselius Mar Thoma Mathews v. Paulose Mar Athanasius*, (1980) 1 SCC 601 at pp. 603-04, *Union of India v. Shiromani Gurdwara Prabandhak Committee*, (1986) 3 SCC 600 at p. 603; AIR 1986 SC 186; *Maneka Sanjay Gandhi v. Rani Jethmalani*, (1979) 4 SCC 167 at p. 171. AIR 1979 SC 468, *G.X. Francis v. Banke Bihari*, AIR 1958 SC 309. 1958 Cri LJ 569; *Kulwinder Kaur v. Kandi Friends Education Trust*, (2008) 3 SCC 659.
17. *Indian Overseas Bank v. Chemical Construction Co.*, (1979) 4 SCC 358: AIR 1979 SC 1514.
18. *Maneka Sanjay Gandhi v. Rani Jethmalani*, (1979) 4 SCC 167: AIR 1979 SC 468.
19. *Ibid*, see also *Union of India v. Shiromani Gurdwara Prabandhak Committee*, (1986) 3 SCC 600: AIR 1986 SC 186, *Subramaniam Swamy v. Ramakrishna Hegde*, (1990) 1 SCC 4.
20. *Anjula v Milan Kumar*, AIR 1981 All 178 at pp. 183-84; *Bajjnath Prasad v Dasrath Prasad*, AIR 1958 Pat 9: ILR 36 Pat 376, *V.S.A. Krishna Mudaliar v. V S A Sabapathi Mudaliar*, AIR 1945 Mad 69: (1945) 1 MLJ 14. ILR 1945 Mad 389.

by any party to the proceeding under Section 24, notice must be given by the court to the opposite party before making an order of transfer.

In *Manjari Sen v. Nirupam Sen*<sup>21</sup>, it was held by the High Court of Delhi that requirement of prior notice cannot be regarded as mandatory unless it has caused prejudice to the other side.

It is, however, submitted that requirement of giving notice must be held to be mandatory. And an order of transfer without notice to the opposite party must be held to be bad in law being violative of the principles of natural justice and fair play.<sup>22</sup>

But it may also be stated that where a court transfers a case *suo motu*, non issuance of notice will not make the order *non est*.<sup>23</sup>

## 10. HEARING OF OBJECTIONS

The primary object of issuing notice to the opposite party is to afford him an opportunity of raising objections and to give hearing against the proposed action of transfer. The court must decide the application of transfer after hearing the objections of the opposite party.<sup>24</sup>

## 11. SUO MOTU TRANSFER

Over and above an application by a party to the suit, appeal or other proceeding, a High Court or a District Court has power to transfer a suit, appeal or other proceeding even *suo motu*.<sup>25</sup>

## 12. POWER AND DUTY OF COURT

The power to transfer a case is in the discretion of the court. This discretion, like every other discretion, has to be exercised judicially, keeping in mind that the law confers a right on the person initiating the proceedings to choose one of the several forums available to him and, as *arbiter litis*, he has the right to select his own forum. Normally, such a right should not be interfered with or curtailed.

21. AIR 1975 Del 42, see also *Anjula v. Milan Kumar*, AIR 1981 All 178

22. *M S Nally Bharat Engg Co Ltd v State of Bihar*, (1990) 2 SCC 48

23. *Bairnath Prasad v Dasrath Prasad*, AIR 1958 Pat 9 ILR 36 Pat 376 (para 4). see also *infra* "Suo motu transfer"

24. *Furruqote v Deon Pandey*, (1878) 2 Cal CR 352, *Jagatguru Shri Shankaracharya v Rampi Tripathi*, AIR 1979 MP 50 1979 MP LJ 305 1979 Jab LJ 167

25. *Kulwinder Kaur v Kandi Friends Education Trust*, (2008) 3 SCC 650 AIR 2008 SC 1333, *Annamalai Chettiar v Ramanathan Chettiar*, AIR 1936 Mad 55 (FB), *B Sundara Gounda v Martin D Souza*, AIR 1989 Kant 207, *Nirmal Singh v State of Haruana*, (1996) 6 SCC 126 AIR 1996 SC 2759

But it cannot reasonably be contended that the plaintiff making an improper choice of forum is immune and his choice cannot be questioned. A court would be justified in inquiring into the circumstances to ascertain whether the right was exercised by the plaintiff *mala fide* or for some ulterior motive or in abuse of his position as *dominus litis*. *Exercise of discretion being dependent on facts and circumstances of each case precedents would not be of much assistance.*<sup>26</sup> (emphasis supplied)

The power of transfer must be exercised with extreme caution and circumspection and in the interests of justice. The court while deciding the question must bear in mind two conflicting interests; (i) as a *dominus litis* the right of the plaintiff to choose his own forum; and (ii) the *power* and *duty* of the court to assure fair trial and proper dispensation of justice. The paramount consideration would be the requirement of justice. And if the ends of justice demand transfer of a case, the court should not hesitate to act. The search must be for justice and the court must be satisfied that justice could more likely to be done between the parties by refusing to allow the plaintiff to continue his suit in the forum of his own choice. The burden of establishing sufficient grounds for transfer is on the applicant. The approach of the court should be pragmatic and not theoretical and the totality of facts and circumstances should be considered.<sup>27</sup>

Again, while dealing with an application or for prayer of transfer, the court should not enter into merits of the matter as it *may* affect the final outcome of the proceedings or cause prejudice to one or the other side. At the same time, however, an order of transfer must reflect application of mind by the court and the circumstances which weighed in taking the action. Power of transfer cannot be exercised *ipse dixit*.<sup>28</sup>

### 13. CALLING FOR REMARKS

When an application for transfer is made by a party and allegations of bias, prejudice or partiality have been levelled against the Presiding Officer of a Court, ordinarily remarks of the judge concerned should be called for before making an order of transfer. In such report, the

26. *Sourindra Narayan v. Rabindra Narayan*, AIR 1987 Ori 47 (49), *Shri Seetha Mahalakshmi Rice & Groundnut Oil Mills v. Rajesh Trading Co.*, AIR 1983 Bom 486; *Indian Overseas Bank v. Chemical Construction Co.*, (1979) 4 SCC 358; AIR 1979 SC 1514, *Jagatguru Shri Shankaracharya v. Ramji Tripathi*, AIR 1979 MP 50.

27. *Arvee Industries v. Ratan Lal*, (1977) 4 SCC 363 at p. 365. AIR 1977 SC 2429 at p. 2431; *Laxmibai Gulabrao v. Martand Daulatrao*, (1972) 74 Bom LR 773; *Hazara Singh v. State of Punjab*, AIR 1965 SC 720; (1964) 4 SCR 1, *Union of India v. Shiromani Gurdwara Prabandhak Committee*, (1986) 3 SCC 600; *Subramaniam Swamy v. Ramakrishna Hegde*, (1990) 1 SCC 4; *Maneka Sanjay Gandhi v. Rani Jethmalani*, (1979) 4 SCC 167 at p. 169, *Baselius Mar Thoma Mathews v. Paulose Mar Athanasius*, (1980) 1 SCC 601 at p. 604.

28. *Kulwinder Kaur v. Kandi Friends Education Trust*, (2008) 3 SCC 659.

Presiding Officer will give his version in respect of averments and allegations made against him. But no remarks should be called for, nor should the Presiding Officer of the Court try to justify the correctness of the order passed by him.<sup>29</sup>

In *Kaushalya Devi v. Mool Raj*<sup>30</sup>, in a transfer application of the accused, the Delhi Administration filed an affidavit of the Magistrate against whom the transfer application was made. Over and above, denying the allegations made by the accused, the Magistrate tried to justify his order on merits. The Supreme Court deprecated the action.

Showing concern over the "partisan role" of the Magistrate and deprecating his action, the Supreme Court stated:

"A little reflection would have satisfied him of the gross impropriety of his action in making an affidavit like the present. *It is an elementary principle of the rule of law that judges who preside over trials, civil or criminal, never enter the arena.*"<sup>31</sup> (emphasis supplied)

#### 14. APPLICATION FOR TRANSFER AFTER HEARING

It is, no doubt, true that an application for a transfer can be made "at any stage".<sup>32</sup> At the same time, however, as the discretionary power of transfer of a suit, appeal or other proceeding requires to be exercised in the interests of justice, the court may refuse such prayer if it is made *mala fide* or with a view to obviate an adverse decision after the hearing is over.

In *Gujarat Electricity Board v. Atmaram Sungomal Poshani*<sup>33</sup>, A, an employee of the Electricity Board was transferred, but he did not resume duty at the transferred place. Disciplinary proceedings were, therefore, taken and his services were terminated. A challenged that order by filing a petition which was allowed by the High Court. The Board approached the Supreme Court. The appeal was posted for hearing and the advocates of both the sides were "fully heard". The Court was satisfied that the High Court was in error in granting relief to A. That view was expressed by the judges constituting the Bench and a suggestion was made as to whether A would settle the matter. The matter was adjourned. When again the appeal was posted for hearing, a new advocate stepped in to argue the matter. The Court refused to hear him. Then an application was made by A for transfer of the case to some other Bench expressing his "no confidence" in the Bench which had

29 *Pushpa Devi v. Jai Narain*, (1992) 2 SCC 676 at p. 678 AIR 1992 SC 1133

30 (1964) 1 CrLJ 233 (1964) 4 SCR 884

31 *Ibid.* at p. 237 (CrLJ)

32 S-24(1)

33 (1989) 2 SCC 602 at p. 606 AIR 1989 SC 1433 at p. 1436 (1989) 10 ATC 396

heard the matter. Describing the prayer as "unusual, uncalled for and unjustified", the Court turned down the request.

## 15. RECORDING OF REASONS

It is desirable to record reasons in support of an order of transfer.<sup>34</sup> Though omission to record reasons may not make the order *ipso facto* bad, in a given case, the superior court may not approve such order on the ground that there was non-application of mind by the court before making such order.<sup>35</sup>

## 16. TRANSFER ON ADMINISTRATIVE GROUNDS

Irrespective of the provisions of the Code, a High Court has power to transfer a suit, appeal or other proceeding on administrative grounds also.<sup>36</sup>

## 17. TRANSFER: EFFECT

Where a suit, appeal or other proceeding is transferred from one court to another, such transfer is not limited to those proceedings. All ancillary and incidental proceedings which may arise out of such suit, appeal, etc. would also be dealt with and decided by transferee court.<sup>37</sup>

## 18. COSTS

Where an application for transfer is dismissed as frivolous, vexatious or *mala fide* the court has power to award substantial and exemplary costs to the opposite party.<sup>38</sup>

## 19. COMPENSATION

The Code states that where an application for transfer is dismissed and the Supreme Court is of the opinion that the application was frivolous or vexatious, it may order the applicant to pay compensation to the

34. *People's Insurance Co. Ltd v Sardul Singh*, AIR 1961 Punj 87; *Bishen Kaur v. Amar Nath*, (1912) 14 IC 561 (Lah). *Kulwinder Kaur v. Kandi Friends Education Trust*, (2008) 3 SCC 659

35. *Kulwinder Kaur v. Kandi Friends Education Trust*, (2008) 3 SCC 659.

36. *Ranbir Yadav v. State of Bihar*, (1995) 4 SCC 392; AIR 1995 SC 1219; *Ritz Hotels v. State*, AIR 1955 Kant 149; *Kanhu Charan v. Banambar Pradhan*, AIR 1986 Ori 213.

37. *Mineral Development Ltd. v. State of Bihar*, AIR 1962 Pat 443; *Kahan Chand v. Faqir Chand*, AIR 1968 P&H 374, *Sk. Abu Bakkar v. Parimal Prova Sarkar*, AIR 1962 Cal 519.

38. S. 35-A; see also *Kuar Maheshwari Prasad v. Bhaiya Rudra Pratap*, AIR 1945 Oudh 233.

opponent as it may consider appropriate in the circumstances of the case.<sup>39</sup> Such sum, however, cannot exceed two thousand rupees.<sup>40</sup>

## 20. APPEAL

An order of transfer neither affects the merits of the controversy between the parties to the suit, nor terminates or disposes of the suit on any ground and, therefore, an order of transfer is not appealable.<sup>41</sup> Similarly, an order of a Single Judge of a High Court transferring a suit is not a "judgment" within the meaning of Letters Patent and, therefore, no letters patent appeal lies against such order.<sup>42</sup>

## 21. REVISION

An order of transfer of a suit, appeal or other proceeding can be said to be a "case decided" within the meaning of Section 115 of the Code and, hence, is open to revision if the conditions laid down in that section are satisfied.<sup>43</sup> Where a case is transferred, ordinarily, a High Court will not entertain a revision petition. But if an order of transfer is passed without issuing a notice to the other side, it is tainted with material irregularity and can be set aside in revision.<sup>44</sup> Similarly, if a court refuses to transfer a suit, appeal or other proceeding on an erroneous view of law that it has no such power, there is failure to exercise jurisdiction vested in the court and the High Court will interfere in revision.<sup>45</sup>

## 22. TRANSFER ALLOWED: ILLUSTRATIVE CASES

The following have been held to be sufficient grounds for transfer: (i) reasonable apprehension in the mind of the litigant that he might not get justice in the court in which the suit is pending;<sup>46</sup> (ii) to avoid

39. S. 25(4)

40. S. 35-A, see also *Kuar Maheshwari Prasad v Bhaiya Rudra Pratap*, AIR 1945 Oudh 233

41. *Asrumati Debi v. Rupendra Deb*, AIR 1953 SC 198 at pp. 200-01, *Radhey Shyam v Shyam Behari*, (1970) 2 SCC 405; AIR 1971 SC 2337, *Shanti Kumar v Home Insurance Co. of New York*, (1974) 2 SCC 387 at p. 389; AIR 1974 SC 1719 at p. 1720.

42. *Asrumati Debi v. Rupendra Deb*, AIR 1953 SC 198 at pp. 200-01; 1953 SCR 1159, *Jagatguru Shri Shankaracharya v Ramji Tripathi*, AIR 1979 MP 50, *Shah Babulal v Jayaben D Kama*, (1981) 4 SCC 8; AIR 1981 SC 1786

43. *Kesho Das v N C Goyal Co.*, AIR 1938 Lah 95; *Fatema Begam v Imdad Ali*, AIR 1920 All 249, *A S De Mello v New Victoria Mills Co. Ltd.*, AIR 1926 All 17, *M S Naidu Bharat Engg Co Ltd v State of Bihar*, (1990) 2 SCC 48; (1990) 2 LLJ 211

44. *Dasarath Prasad v Baunath Prasad*, AIR 1960 Pat 285

45. *Ibid* see also *infra* Chap. 9

46. *Jagatguru Shri Shankaracharya v Ramji Tripathi*, AIR 1979 MP 50; *Manak Lal v Dr Prem Chand*, AIR 1957 SC 425 at p. 429, *Kamla v Harish Kumar*, (1993) 1 Raj LR 527.

multiplicity of proceedings or conflicting decisions;<sup>47</sup> (iii) where the judge is interested in one party or prejudiced against the other;<sup>48</sup> (iv) where common questions of fact and law arise between the parties in two suits;<sup>49</sup> (v) where balance of convenience requires, e.g. where the property is situate or parties or their witnesses reside; or the account books are kept, etc.;<sup>50</sup> (vi) where two persons have filed suits against each other in different courts on the same cause of action;<sup>51</sup> (vii) where transfer avoids delay and unnecessary expenses;<sup>52</sup> (viii) where important questions of law are involved; or a considerable section of the public is interested in the litigation;<sup>53</sup> (ix) where transfer prevents abuse of the process of court;<sup>54</sup> (x) where transfer is necessary for only one adjudication of a particular controversy,<sup>55</sup> etc.

### 23. TRANSFER NOT ALLOWED: ILLUSTRATIVE CASES

The following, on the other hand, have been held not to be sufficient grounds for transfer: (i) mere fact that the opposite party is a man of

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*Kiran Ramanlal v. Gulam Kader*, 1995 Supp (2) SCC 707; see also, *Authors' Lectures on Administrative Law* (2012) Lecture VI

47. *Indian Overseas Bank v. Chemical Construction Co.*, (1979) 4 SCC 358; AIR 1979 SC 1514; *Guda Vijayalakshmi v. Guda Ramachandra*, (1981) 2 SCC 650 at p. 650; AIR 1981 SC 1143 at pp. 1145-46.
48. *Cottle v. Cottle*, (1939) 2 All ER 535; *Gujarat Electricity Board v. Atmaram Sungomal Poshani*, (1989) 2 SCC 602; AIR 1989 SC 1433; see also, *Authors' Lectures on Administrative Law* (2012) Lecture VI.
49. *Indian Overseas Bank v. Chemical Construction Co.*, (1979) 4 SCC 358; AIR 1979 SC 1514; *Jagatguru Shri Shankaracharya v. Ramji Tripathi*, AIR 1979 MP 50; *Bihar State Food & Supplies Corpn. Ltd. v. Godrej Soap (P) Ltd.*, (1997) 1 SCC 748; *Vatsa Industries Ltd. v. Shankarlal Saraf*, (1997) 10 SCC 333; *Seema Shrinidhi v. Praveen Kumar*, (1997) 8 SCC 712; *Shakuntala Modi v. Om Prakash*, (1991) 2 SCC 706; AIR 1991 SC 1104; *Rekha Aggarwal v. Sunil Aggarwal*, 1992 Supp (1) SCC 438 (1)
50. *Arvee Industries v. Ratan Lal*, (1977) 4 SCC 363; AIR 1977 SC 2429; *Jagatguru Shri Shankaracharya v. Ramji Tripathi*, AIR 1979 MP 50 at p. 56; *Beni Shankar v. Surya Kant*, (1981) 3 SCC 627; AIR 1982 SC 52; *Subramaniam Swamy v. Ramakrishna Hegde*, (1990) 1 SCC 4; *Murray & Co. (P) Ltd. v. Madanlal Poddar*, 1994 Supp (3) SCC 696; *Jaishree Banerjee v. Abhirup Banerjee*, (1997) 11 SCC 107.
51. *G.M. Rajulu v. M. Govindan Nair*, AIR 1938 Mad 745; *Manjari Sen v. Nirupam Sen*, AIR 1975 Del 42.
52. *Baselius Mar Thoma Mathews v. Paulose Mar Athanasius*, (1980) 1 SCC 601 at pp. 603-04; AIR 1979 SC 1909 at p. 1910; *Union of India v. Shiromani Gurdwara Prabandhak Committee*, (1986) 3 SCC 600; AIR 1986 SC 186; *Shiv Kumari v. Ramajor Shilla Prasad*, (1997) 2 SCC 452; AIR 1997 SC 1036.
53. *Arvee Industries v. Ratan Lal*, (1977) 4 SCC 363; AIR 1977 SC 2429; *SBI v. Sakow Industries Faridabad (P) Ltd.*, AIR 1976 P&H 321.
54. *Union of India v. Shiromani Gurdwara Prabandhak Committee*, (1986) 3 SCC 600; AIR 1986 SC 186; *Maneka Sanjay Gandhi v. Rani Jethmalani*, (1979) 4 SCC 167; AIR 1979 SC 468; *G X. Francis v. Banke Bihari*, AIR 1958 SC 309; 1958 Cri LJ 569.
55. *Ibid*, *Kulwinder Kaur v. Kandi Friends Education Trust*, (2008) 3 SCC 659.

influence in the locality;<sup>56</sup> (ii) mere fact that the court is situate at a long distance from the residence of the applicant;<sup>57</sup> (iii) mere fact that the presiding officer belongs to a community rival to that of the applicant;<sup>58</sup> (iv) mere fact that the judge has decided a similar point in a previous case;<sup>59</sup> (v) mere balance of convenience to the applicant;<sup>60</sup> (vi) refusal to grant adjournment;<sup>61</sup> (vii) prejudice of a judge against a party's pleader not likely to affect the party;<sup>62</sup> (viii) judge making adverse remarks regarding merits of the case;<sup>63</sup> (ix) allegation of apprehension against fair trial without furnishing particulars;<sup>64</sup> (x) on counsel losing temper and using unparliamentary language, the judge ordering adjournment,<sup>65</sup> etc.

## 24. CONCLUDING REMARKS

As discussed above, the power of transfer must be exercised with due care, caution and circumspection and in the interests of justice.<sup>66</sup> The court while deciding the question must bear in mind two conflicting interests, (i) as a *dominus litis* the right of the plaintiff to choose his own forum; and (ii) the *power and duty* of the court to assure a fair trial and proper dispensation of justice. The paramount consideration would be the requirement of justice. And if the ends of justice demand transfer of a case, the court should not hesitate to act.

At the same time, mere inconvenience of the party or bare and vague allegations by an interested party about insecurity or even a threat to his life are not sufficient to transfer a case. Want of territorial jurisdiction of the court to which the case is transferred, though a relevant factor, is not conclusive and will not be an impediment to the power of the

56. *Subramaniam Swamy v. Ramakrishna Hegde*, (1990) 1 SCC 4; *Maneka Sanjay Gandhi v. Rani Jethmalani*, (1979) 4 SCC 167; AIR 1979 SC 468

57. *Manohar Lal Chopra v. Seth Hiralal*, AIR 1962 SC 527. 1962 Supp (1) SCR 450, *Arvec Industries v. Ratan Lal*, (1977) 4 SCC 363. AIR 1977 SC 2429, *Kalpna Devi Prakash v. Devi Prakash*, (1996) 11 SCC 96.

58. *Gaja Dhar Parsad v. Sohan Lal*, AIR 1934 Lah 762

59. *Krishan Kanahya v. Vijay Kumar*, AIR 1976 Del 184.

60. *Indian Overseas Bank v. Chemical Construction Co.*, (1979) 4 SCC 358 AIR 1979 SC 1514; *Subramaniam Swamy v. Ramakrishna Hegde*, (1990) 1 SCC 4. *Mahabir Prasad v. Jacks Aviation (P) Ltd.*, (1999) 1 SCC 37 at p 44

61. *B K Ghosh v. R K Joysurendera Singh* AIR 1956 Mani 21

62. *Mula Naramma v. Mula Rengamma*, AIR 1926 Mad 359

63. *Gujarat Electricity Board v. Atmaram Sungomal Poshani*, (1989) 2 SCC 602 at p 606 AIR 1989 SC 1433 at p 1436. *M Y Shareef v. Nagpur High Court*, AIR 1955 SC 19 at pp 24-25 (1955) 1 SCR 757. *Krishan Kanahya v. Vijay Kumar*, AIR 1976 Del 184. *C V Xavier v. J&J Delhane*, AIR 1972 Ker 263. *G. Lakshmi Ammal v. Elumalai Chettiar* AIR 1981 Mad 24. *Sini (Dr.) v. B. Suresh Iyothi*, AIR 1996 Ker 160

64. *Maneka Sanjay Gandhi v. Rani Jethmalani*, (1979) 4 SCC 167; AIR 1979 SC 468

65. *X v. Y* AIR 1979 HP 29

66. *Kulvinder Kaur v. Kandi Friends Education Trust*, (2008) 3 SCC 659 AIR 2008 SC 1333

court ordering the transfer.<sup>67</sup> Although discretionary power of transfer cannot be imprisoned within a straitjacket of any cast-iron formula unanimously applicable to all situations, it cannot be gainsaid that the power to transfer a case must be exercised with due care and caution.<sup>68</sup>

It is submitted that the following observations of Krishna Iyer, J. in the leading case of *Maneka Sanjay Gandhi v. Rani Jethmalani*<sup>69</sup> lay down correct law on the point and are, therefore, worth quoting:

"Assurance of a fair trial is the first imperative of the dispensation of justice and the criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal service or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the court is to exercise its power of transfer. *This is the cardinal principle although the circumstances may be myriad and vary from case to case.*"<sup>70</sup>

67. *Arvee Industries v. Ratan Lal*, (1977) 4 SCC 363; *Union of India v. Shiromani Gurdwara Prabandhak Committee*, (1986) 3 SCC 600; *Subramaniam Swamy v. Ramakrishna Hegde*, (1990) 1 SCC 4; *Maneka Sanjay Gandhi v. Rani Jethmalani*, (1979) 4 SCC 167.

68. *Kulwinder Kaur v. Kandi Friends Education Trust*, (2008) 3 SCC 659.

69. (1979) 4 SCC 167; AIR 1979 SC 468.

70. *Ibid*, at p. 169 (SCC); at p. 469 (AIR), see also *Pushpa Devi v. Jai Narain*, (1992) 2 SCC 676; AIR 1992 SC 1133.

## CHAPTER 2

# Restitution

### SYNOPSIS

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### 1. RESTITUTION: MEANING

The expression "restitution" has not been defined in the Code, but it is "an act of restoring a thing to its proper owner".<sup>1</sup> "Restitution" means restoring of anything unjustly taken from another. It provides for putting a party in possession of land, tenement or property, who had been unlawfully dispossessed, deprived or disseised of it.

In other words, restitution means restoring to a party the benefit which the other party has received under a decree subsequently held to be wrong.<sup>2</sup> The word "restitution" in its etymological sense means restoring to a party on the modification, variation or reversal of a decree what has been lost to him in execution of the decree or in direct consequence of the decree.<sup>3</sup>

1 *Shorter Oxford English Dictionary* (1990) Vol. II at pp. 1811-12; *Concise Oxford English Dictionary* (2002) at p. 1220

2 *Per Subba Rao, J. in Mahipbhai Mohanbhai v. Patel Manibhai*, AIR 1965 SC 1477 at p. 1482; (1965) 2 SCR 436

3 *Zafar Khan v. Board of Revenue*, 1984 Supp SCC 505 at pp. 513-14; AIR 1985 SC 39 at p. 46.

## 2. DOCTRINE EXPLAINED

The principle of the doctrine of restitution is that, on the reversal of a decree, the law imposes an obligation on the party to the suit who received an unjust benefit of the erroneous decree to make restitution to the other party for what he has lost. The obligation arises automatically on the reversal or modification of the decree and necessarily carries with it the right to restitution of all that has been done under the erroneous decree; and the court in making the restitution is bound to restore the parties, so far as they can be restored, to the same position they were in at the time when the court by its erroneous action had displaced them from.<sup>4</sup>

Section 144 does not confer any new substantive right. It merely regulates the power of the court in that behalf.<sup>5</sup> It is the bounden duty of courts to see that if a person is harmed by a mistake of the court he should be restored to the position he would have occupied but for that mistake.<sup>6</sup> Similarly, on the reversal of a judgment the law places an obligation on the party who received the benefit of the erroneous judgment to make restitution to the other party for what he has lost and it is the duty of the court to enforce the obligation; unless it is shown that restitution would be clearly contrary to the real justice of the case.<sup>7</sup>

In *Halsbury's Laws of England*, it is stated, "Any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep."<sup>8</sup>

The jurisdiction to make restitution is inherent in every court and can be exercised whenever justice of the case demands.<sup>9</sup>

### *Illustrations*

(1) A obtains a decree against B for possession of immovable property and in execution of the decree obtains possession thereof. The decree is subsequently reversed in appeal. B is entitled under this section to restitution of the property, even though there is no direction for restitution in the decree of the appellate court.

(2) A obtains a decree against B for Rs 5000, and recovers the amount in execution. The decree is subsequently reversed in appeal. B is entitled

4. *Binayak Swain v Ramesh Chandra*, AIR 1966 SC 948 at p. 950; *Lal Bhagwant Singh v Kishen Das*, AIR 1953 SC 136 at p. 139; 1953 SCR 559, *Kavita Trehan v. Balsara Hygiene Products Ltd.*, (1994) 5 SCC 380; AIR 1995 SC 441.

5. *Union Carbide Corpn. v. Union of India*, (1991) 4 SCC 584 (671-72); AIR 1992 SC 248.

6. *Jang Singh v. Brij Lal*, AIR 1966 SC 1631 at pp 1632-33; (1964) 2 SCR 145.

7. *Lal Bhagwant Singh v. Kishen Das*, AIR 1953 SC 136, at p 139 (AIR), *Binayak v. Ramesh Chandra*, *supra*; *Prithvinath Singh v Suraj Ahir*, (1970) 3 SCC 794 at p 799.

8. *Halsbury's Laws of England* (4th Edn.) at p 434.

9. *Kavita Trehan v. Balsara Hygiene Products Ltd.*, (1994) 5 SCC 380 AIR 1995 SC 441.

THE [illegible] OF [illegible]

[illegible text]

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[illegible text]

[illegible text]

but for such decree or such part thereof as has been varied or reversed. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent under the general jurisdiction of the court to act rightly and fairly according to the circumstances towards all parties involved."

*Illustration*

(1) *A* obtains a decree against *B* and recovers the amount due under the decree by execution. Subsequently it is found that *B* was dead at the time of institution of the suit. The decree is a nullity, and the court, having levied

## 5. CONDITIONS

Before restitution can be ordered under this section, the following three conditions must be satisfied:<sup>21</sup>

- (1) The restitution sought must be in respect of the decree or order which had been reversed or varied;
- (2) The party applying for restitution must be entitled to benefit under the reversing decree or order; and
- (3) The relief claimed must be properly consequential on the reversal or variation of the decree or order.

In other words, (i) there must be an erroneous judgment; (ii) the benefit of that erroneous judgment has been received by one party; and (iii) the erroneous judgment has been reversed, set aside or modified.<sup>22</sup> If these conditions are satisfied, the court must grant restitution. It is not discretionary but obligatory.<sup>23</sup>

## 6. WHO MAY APPLY?

In order to entitle a person to apply under this section, two conditions must be satisfied:

- (1) He must be a party to the decree or order varied or reversed.  
The expression "party" is not confined to mean only a technical party to the suit or appeal but includes any beneficiary under the final judgment;<sup>24</sup> and
- (2) He must have become entitled to any benefit by way of restitution or otherwise under the reversing decree or order.<sup>25</sup> Thus, a trespasser cannot get restitution.<sup>26</sup>

It is, however, not necessary that the decree or order by which the original decree or order is reversed or varied should declare the party's rights to restitution. Where the effect of the decree of the appellate court is to reverse the decree of the lower court, the party against whom the

21. *Ganesh Parshad v. Adi Hindu Social Service League*, AIR 1975 AP 310 at p. 313; *Gurunath Khandappagouda v. Venkatesh Lingo*, AIR 1937 Bom 101 at p. 103, *Puni Devi v. Jagannath*, AIR 1994 Ori 240.

lower court's erroneous decree has been enforced is entitled to apply for restitution under this section.<sup>27</sup>

## 7. AGAINST WHOM RESTITUTION MAY BE GRANTED?

Restitution can be ordered under this section not only against the party to the litigation, but also against his legal representatives, e.g. transferee *pendente lite*, attaching decree-holder, etc.<sup>28</sup> Section 144 applies only to the parties or their representatives and does not apply to sureties. Hence, restitution cannot be claimed against a surety.<sup>29</sup> It also cannot be granted against a *bona fide* auction-purchaser.<sup>30</sup>

## 8. WHO MAY GRANT RESTITUTION?

An application for restitution lies to the court which has passed the decree or made the order.<sup>31</sup>

The Explanation as inserted by the Amendment Act, 1976 defines the expression "Court which passed the decree or order". It includes (a) where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction, the court of first instance; (b) where the decree or order has been set aside by a separate suit, the court of first instance which passed such decree or order; and (c) where the court of first instance has ceased to exist or has ceased to have jurisdiction to execute it, the court which, if the suit wherein the decree or order was passed were instituted at the time of making the application for restitution under this section, would have jurisdiction to try such suit.<sup>32</sup>

## 9. NATURE OF PROCEEDINGS

At one time, there was a conflict of judicial opinion as to whether proceedings under Section 144 of the Code were proceedings in execution.

27. *Sevatha Goundan v. Pappammal*, AIR 1935 Mad 476; *Gurunath Khandappagouda v. Venkatesh Lingo*, AIR 1937 Bom 101.

28. *Parmeshari Din v. Ram Charan*, AIR 1937 PC 260; *Pyare Chand case*, AIR 1975 AP 228; *Samarjut Singh v. Director of Consolidation*, AIR 1974 All 82 at pp. 84-85; *Manikchand v. Gangadhar*, AIR 1961 Bom 288; *Shanker Lal v. Ram Kishan*, AIR 1976 All 250.

29. *Raj Raghubar Singh v. Jai Indra Bahadur*, AIR 1919 PC 55; *State Bank of Saurashtra v. Chitranganj Rangnath*, (1980) 4 SCC 516 at p. 525; AIR 1980 SC 1528 at p. 1534.

30. *Janak Raj v. Gurdial Singh*, AIR 1967 SC 608; (1967) 2 SCR 77; *Chinnammal v. P. Arumugham*, (1990) 1 SCC 513; *Padanathil Ruqmini v. P.K. Abdulla*, (1996) 7 SCC 668; AIR 1996 SC 1204.

31. Expln. to S. 144(1).

32. Clauses (a), (b), (c) to Expln. to S. 144(1).

According to one view, they were, but according to other view, they were not.

But after the decision of the Supreme Court in *Mahijibhai Mohanbhai v. Patel Manibhai*,<sup>33</sup> the proceedings for restitution are proceedings in execution.

## 10. FORM OF APPLICATION

No specific form has been prescribed by the Code for making an application for restitution.

## 11. EXTENT OF RESTITUTION

The court in making restitution is bound to restore the parties so far as they can be restored to the same position they were in at the time when the court by its erroneous action had displaced them.<sup>34</sup> The words "place the parties in the position which they would have occupied but for such a decree" should be construed to mean that the parties should be put in the position which they would have occupied but for a wrong judgment, decree or order.<sup>35</sup>

## 12. INHERENT POWER TO GRANT RESTITUTION

Section 144 of the Code embodying the doctrine of restitution does not confer any new substantive right to the party not available under the general law. It merely regulates the power of courts. The doctrine is based on equity and against unjust enrichment. Section 144 is not exhaustive. It incorporates only a part of general law of restitution. There is always an inherent jurisdiction to order restitution.<sup>36</sup>

## 13. RES JUDICATA

The doctrine of *res judicata* applies to execution proceedings also.<sup>37</sup> An application for restitution dismissed on merits, hence, would operate

33 AIR 1965 SC 1477 (1965) 2 SCR 436, see also *Maqbool Alam v Khodana*, AIR 1966 SC 1194 (1966) 3 SCR 479

34 *Lal Bhagwant Singh v Kishen Das*, AIR 1953 SC 136 at p 139; 1953 SCR 559; *Mahijibhai Mohanbhai Barot v. Patel Manibhai Gokalbhai*, AIR 1965 SC 1477

35 *Ibid*, see also *Binayak v Rameshchandra*, AIR 1966 SC 948; *L. Gurun Ditta v T.R. Ditta*, AIR 1935 PC 12; 153 IC 654 (PC)

36 *Union Carbide Corpn v Union of India*, (1991) 4 SCC 584 (671-72) AIR 1992 SC 248; *Kavita Trehan v Balsara Hygiene Products Ltd.*, (1994) 5 SCC 380 AIR 1995 SC 441

37 Expln VII to S. 11. For detailed discussion, see *supra*, Pt II Chap 2

as *res judicata*. But if such an application is dismissed on some technical grounds, a fresh application will be maintainable.<sup>38</sup>

## 14. BAR OF SUIT

Sub-section (2) of Section 144 provides in express terms that where restitution could be claimed by an application under this section, no separate suit shall be brought for such relief.<sup>39</sup>

## 15. LIMITATION

An application under Section 144 is an application for execution of a decree and is governed by Article 136 of the Limitation Act, 1963.<sup>40</sup> The period of limitation for such an application is twelve years and it will start from the date of the appellate decree or order.<sup>41</sup>

## 16. APPEAL

The determination of a question under Section 144 has been expressly declared to be a "decree" under Section 2(2) of the Code and is, therefore, appealable.<sup>42</sup> Second appeal also lies on a "substantial question of law".<sup>43</sup>

## 17. REVISION

Since an order under Section 144 is a "decree", it is appealable and no revision lies against such order. But where the order does not fall under four corners of the section, a revision is maintainable as it can be said to be a "case decided" under Section 115 of the Code.<sup>44</sup>

38. *Maqbool Alam v. Khodaiya*, AIR 1966 SC 1194; (1966) 3 SCR 479; *Sheoratan Kurmi v. Kalicharan Ram*, AIR 1968 Pat 270, *Choudhary Hariram v. Pooransingh*, AIR 1962 MP 295.

39. *Kunwar Rohani Ramandhwaj v. Thakur Har Prasad*, AIR 1943 PC 189; *Ansuya Bai v. Ramaiah Raju*, AIR 1961 Mys 238, *Math Sauna v. Kedar Nath*, AIR 1977 All 115; *Mahijibhai Mohanbhai v. Patel Manibhai*, AIR 1965 SC 1477; (1965) 2 SCR 436.

40. *Mahijibhai Mohanbhai v. Patel Manibhai*, AIR 1965 SC 1477 at p. 1486. (1965) 2 SCR 436.

41. Art 136, Limitation Act, 1963.

42. *Rahimbhoy v. C.A. Turner*, ILR (1890) 15 Bom 155 (PC), *Bhim Rao v. Laxmibai*, AIR 1966 Mys 112 at p. 115, *Abdul Majid v. Abdul Sattar*, AIR 1941 Nag 313; *Sarat Chandra v. Subasini Devi*, AIR 1930 Cal 89.

43. For detailed discussion, see, Pt III, Chap 3

44. *Maqbool Alam v. Khodaiya Begum*, AIR 1949 Pat 133 (FB); *Kaku Singh v. Gobind Singh*, AIR 1959 Punj 468. For detailed discussion of revisional jurisdiction of High Courts, see *supra*, Pt. III, Chap. 9.

### 18. ORDER IMPLEMENTED: EFFECT

Even if a decree is executed or order is implemented, restitution proceedings under Section 144 of the Code will not become infructuous. Normally, it is only after the decree is executed or order is implemented and enforced that the question of restitution or restoration of earlier position arises. It is, therefore, not open to a court to dispose of an application for restitution that the order has already been given effect and nothing requires to be made.<sup>45</sup>

45 *State of Gujarat v Dilipbhai Shaligram Patil*, (2006) 8 SCC 72 AIR 2006 SC 3091; *Damodar Mishra v State of Orissa*, 1994 Supp (2) SCC 51.

## CHAPTER 3

### Caveat

#### SYNOPSIS

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#### 1. MEANING

The term "caveat" has not been defined in the Code. The word (caveat) has been derived from Latin which means "beware". According to the dictionary meaning,<sup>1</sup> "a caveat is an entry made in the books of the offices of a registry or court to prevent a certain step being taken without previous notice to the person entering the caveat".

In other words, a caveat is a caution or warning given by a party to the court not to take any action or grant any relief to the applicant without notice or intimation being given to the party lodging the caveat and interested in appearing and objecting to such relief. It is very common in testamentary proceedings. It is a precautionary measure taken against the grant of probate or letters of administration, as the case may be, by the person lodging the caveat.<sup>2</sup> The person filing or lodging a caveat is called "caveator". Section 148-A of the Code of Civil Procedure provides for lodging of a caveat.

1. Earl Jowitt, *The Dictionary of English Law* (1977) Vol. 1 at p. 298; *The Concise Oxford English Dictionary* (2002) at p. 225.
2. S. 284, Indian Succession Act, 1925. See also *Nirmal Chandra v Girindra Narayan*, AIR 1978 Cal 492 at p. 494. 82 CWN 1026; *C. Seethaiah v. Govt of A P*, AIR 1983 AP 443; *H.G. Shankar Narayan v. State of Rajasthan*, AIR 1985 Raj 156. 1984 Raj LW 266.

## 2. SECTION 148-A

Section 148-A, as inserted by the Amendment Act, 1976 is a salutary provision. It allows a person to lodge a caveat in a suit or proceeding instituted or about to be instituted against him. It reads as under:

"S. 148-A Right to lodge a caveat.—(1) Where an application is expected to be made, or has been made, in a suit or proceeding instituted, or about to be instituted, in a court, any person claiming a right to appear before the court on the hearing of such application may lodge a caveat in respect thereof.

- (2) Where a caveat has been lodged under sub-section (1), the person by whom the caveat has been lodged (hereinafter referred to as the caveator) shall serve a notice of the caveat by registered post, acknowledgment due, on the person by whom the application has been, or is expected to be made, under sub-section (1).
- (3) Where, after a caveat has been lodged under sub-section (1), any application is filed in any suit or proceeding, the court shall serve a notice of the application on the caveator.
- (4) Where a notice of any caveat has been served on the applicant, he shall forthwith furnish the caveator, at the caveator's expense, with a copy of the application made by him and also with copies of any paper or document which has been, or may be, filed by him in support of the application.
- (5) Where a caveat has been lodged under sub-section (1), such caveat shall not remain in force after the expiry of ninety days from the date on which it was lodged unless the application referred to in sub-section (1) has been made before the expiry of the said period.

## 3. OBJECT

The underlying object of a caveat is twofold:

*Firstly*, to safeguard the interest of a person against an order that may be passed on an application filed by a party in a suit or proceeding instituted or about to be instituted. Such a person lodging a caveat may not be a necessary party to such an application, but he may be affected by an order that may be passed on such application. The section thus affords an opportunity to such party of being heard before an *ex parte* order is made.

*Secondly*, it seeks to avoid multiplicity of proceedings. In the absence of such a provision, a person who is not a party to such an application and is adversely affected by the order has to take appropriate legal proceedings to get rid of such order.<sup>3</sup>

Such a provision is found in the Supreme Court Rules.<sup>4</sup> The Law Commission, therefore, recommended insertion of such a provision in

3 *Nirmal Chandra v. Girindra Narayan*, AIR 1978 Cal 492 at p. 494. 82 CWN 1026.

4 Supreme Court Rules, 1966. Or. 19 R. 2.

the Code of Civil Procedure also. Accordingly, Section 148-A has been inserted by the Amendment Act of 1976.<sup>5</sup>

#### 4. NATURE AND SCOPE

Section 148-A enacts that a caveat can be lodged in a *suit* or *proceeding*. Construing the connotation in a narrow manner, some High Courts have taken the view that no caveat can be filed in a first or second appeal or in execution proceedings. But, as observed in *Ram Chandra Aggarwal v. State of U.P.*<sup>6</sup>, the expression "Civil Proceedings" in Section 141 of the Code includes all proceedings which are not original proceedings. Thus, the provision relating to caveat would be applicable to suits, appeals as well as other proceedings under the Code or under other enactments.<sup>7</sup>

It is no doubt true that no order should be passed against the caveator unless he is heard, but if the caveator is not present at the time of hearing of the application and the court finds that there is a *prima facie* case in favour of the applicant, *ad interim* relief can be granted by the court in his favour. Interim order passed without giving notice to the caveator is not without jurisdiction and is operative till it is set aside in appropriate proceedings.<sup>8</sup>

#### 5. WHO MAY LODGE CAVEAT?

Sub-section (1) of Section 148-A prescribes qualifications for the person who intends to lodge a caveat. He must be a person claiming a right to appear before the court on the hearing of the application, which the applicant might move for the grant of interim relief. The language of sub-section (1) of Section 148-A is wide enough to include not only a necessary party, but even a proper party.<sup>9</sup> Hence, a caveat may be filed by any person who is going to be affected by an interim order likely to be passed on an application which is expected to be made in a suit or proceeding instituted or about to be instituted in a court.<sup>10</sup>

5. Law Commission's Fifty-fourth Report at p. 118; see also *Chandrajit v. Ganeshiya*, AIR 1987 All 360.

6. AIR 1966 SC 1888; 1966 Supp SCR 393.

7. *Chandrajit v. Ganeshiya*, AIR 1987 All 360.

8. *Employees Assn. v. RBI*, AIR 1981 AP 246; (1981) 1 AP LJ 338; *Babubhai Nagindas Shah v. State*, (1983) 24 (1) Guj LR 784.

9. *Employees Assn. v. RBI*, AIR 1981 AP 246; (1981) 1 AP LJ 338.

10. *Nirmal Chandra v. Girindra Narayan*, AIR 1978 Cal 492 at p. 494; 82 CWN 1026, G C *Siddalingappa v. G.C. Veeranna*, AIR 1981 Kant 242 at p. 243.

Thus, a person who is a stranger to the proceeding cannot lodge a caveat.<sup>11</sup> Likewise, a person supporting the application for interim relief made by the applicant also cannot file a caveat.<sup>12</sup>

Generally, a caveat can be filed after the judgment is pronounced. In exceptional cases, however, a caveat may be filed even before the pronouncement of the judgment.<sup>13</sup>

## 6. WHEN CAVEAT MAY BE LODGED?

Normally, a caveat may be lodged after the judgment is pronounced or order is passed. In exceptional cases, however, a caveat may be filed even before pronouncement of judgment or passing of order.<sup>14</sup>

## 7. WHEN CAVEAT DOES NOT LIE?

The provisions of Section 148-A of the Code can be attracted only in cases where the caveator is entitled to be heard before any order is made on the application already filed or proposed to be filed. The section cannot be construed to mean and provide that even in cases where the Code does not contemplate notice, it can be claimed by lodging a caveat. Such a construction would be inconsistent with the object underlying Section 148-A.<sup>15</sup>

## 8. FORM

Unlike the Indian Succession Act<sup>16</sup>, no form of caveat has been prescribed under the Code.<sup>17</sup> A caveat may, therefore, be filed in the form of a petition wherein the caveator has to specify the nature of the application which is expected to be made or has been made and also his

11. *Kattil Vayalil Parkkum v. Mannil Paadikayil*, AIR 1991 Ker 411; *Nav Dignay Coop Housing Society Ltd v. Sadhana Builders*, AIR 1984 Bom 114, *Chloride India Ltd v Ganesh Das*, AIR 1986 Cal 74.

12. *Nirmal Chandra v. Girindra Narayan*, AIR 1978 Cal 492 at p. 494 82 CWN 1026, *Mahatma Gandhi Housing Colony Development Society v Devangapuri Gram Panchayat*, 1995 AlHC 3243 (AP).

13. *Pashupati Nath v Registrar, Coop Societies*, AIR 1983 Raj 191 at p. 192, *H G Shankar Narayan v State of Rajasthan*, AIR 1985 Raj 156 at p. 160 1984 Raj LW 266.

14. *Pashupati Nath v Registrar, Coop Societies*, AIR 1983 Raj 191 1982 RLR 694 1982 RLW 572, *H G Shankar Narayan v State of Rajasthan*, AIR 1985 Raj 156 1984 Raj LW 266.

15. *Chloride India Ltd v Ganesh Das*, AIR 1986 Cal 74 *Nav Dignay Coop Housing Society Ltd v Sadhana Builders*, AIR 1984 Bom 114, *Kattil Vayalil Parkkum v Mannil Paadikayil*, AIR 1991 Ker 411, *Madhukantaben v. Arvindlal Kantilal & Co.*, 1985 Guj LH 391.

16. S 284(4) Sch V

17. The High Court of Bombay, however, has framed "Caveat Rules" and also prescribed "Form of Caveat", see, Order 40-A, as inserted by Bombay

right to appear before the court at the hearing of such application.<sup>18</sup> The Stamp Reporter or Registry of the court will keep a register wherein entries will be made of the filing of caveats.<sup>19</sup>

## 9. NOTICE

When a caveat is lodged, the court will serve a notice of an application on the caveator. The section obliges the applicant who has been served with a caveat to furnish the caveator, at the caveator's expense, a copy of the application along with copies of papers and documents submitted by him in support of his application.<sup>20</sup>

## 10. RIGHTS AND DUTIES

Sub-sections (2), (3) and (4) of Section 148-A prescribe the rights and duties of the caveator who lodges a caveat, of the applicant who intends to obtain an interim order and of the court.

### (a) Of caveator

Under sub-section (2) of Section 148-A, once a party is admitted to the status of a caveator, he is clothed with certain rights and duties. It is his duty to serve a notice of the caveat lodged by him by registered post on the person or persons by whom an application against the caveator for an interim order has been or is expected to be made.<sup>21</sup>

The provision is directory and not mandatory. Where no notice could be served on account of uncertainty of the person likely to institute a suit, appeal or other proceeding, the court may, at its discretion, dispense with the service of notice of a caveat and permit a party to lodge a caveat without naming the party respondent.<sup>22</sup>

### (b) Of applicant

Sub-section (4) of Section 148-A provides that it is the duty of the applicant to furnish to the caveator forthwith at the caveator's expense a

18. *Nirmal Chandra v. Girindra Narayan*, AIR 1978 Cal 492 at p. 494; 82 CWN 1026.

19. *Chandrajit v. Ganeshiya*, AIR 1987 All 360 For Model "Caveat", see, Appendix I.

20. *Nova Granites (India) Ltd. v. Craft (Banglore) (P) Ltd.*, (1994) 1 Civ LJ 711 (Kant); *Akbar Ali v. Alla Pitchai*, 2000 AIHC 115 (Mad).

21. *Nirmal Chandra v. Girindra Narayan*, AIR 1978 Cal 492; *Employees Assn. v. RBI*, AIR 1981 AP 246; *Pashupati Nath v. Registrar, Coop. Societies*, AIR 1983 Raj 181; *G.C. Siddalingappa v. G.C. Veeranna*, AIR 1981 Kant 242; *C. Seethaiah v. Govt. of A.P.*, AIR 1983 AP 443.

22. *State of Karnataka v. NIL*, (1999) 5 Kant LJ 637.

copy of the application made by him along with the copies of papers and documents on which he relies. This provision thus makes it obligatory for the applicant to serve his application along with all copies and documents filed or intended to be filed in support of his application.<sup>23</sup>

### (c) Of court

Once a caveat had been lodged, under sub-section (3), it is the duty of the court to issue a notice of that application on the caveator. This duty has been cast on the court obviously for the purpose of enabling the caveator to appear and oppose the granting of an interim relief in favour of the applicant.<sup>24</sup> Although the expression "notice of application" has not been defined in the Code, it would include the date of hearing.<sup>25</sup> It must, therefore, be taken that it is the duty of the court to give a sufficiently reasonable and definite time to the caveator to appear and to oppose the application filed by the applicant.<sup>26</sup> This duty of the court is in addition to the duty of the applicant under sub-section (4) and non-compliance with it defeats the very object of introducing Section 148-A and the breach thereof vitiates the order. Therefore, merely because the caveator refuses to accept the copy of the application from the applicant, the court is not absolved from serving the notice of the application to the caveator.<sup>27</sup>

## 11. FAILURE TO HEAR CAVEATOR: EFFECT

The intention of the Legislature in enacting the provision of caveat is to enable the caveator to be heard before any orders are passed and no orders are passed by the court *ex parte*.<sup>28</sup> It is, therefore, clear that once a caveat is filed, it is a condition precedent for passing an interim order to serve a notice of the application on the caveator who is going to be affected by the interim order.<sup>29</sup> *Unless that condition precedent is satisfied,*

23. *Employees Assn. v RBI* AIR 1981 AP 246, *G C Siddalingappa v. G C Veeranna* AIR 1981 Kant 242, *C Seethaiah v Govt of A P.* AIR 1983 AP 443

24. *Nirmal Chandra v Girindra Narayan*, AIR 1978 Cal 492, *Employees Assn v RBI*, AIR 1981 AP 246, *G C Siddalingappa v. G C. Veeranna*, AIR 1981 Kant 242, *Kandla Port Trust v Mulraj*, (1986) 27 (1) GLR 442 at p 449

25. *Employees Assn v RBI*, AIR 1981 AP 246 (1981) 1 AP LJ 338

26. *Ibid*, see also, *G C Siddalingappa v G C Veeranna* AIR 1981 Kant 242.

27. *Ibid*, see also, *C Seethaiah v Govt of A P.* AIR 1983 AP 443

28. *Nirmal Chandra v Girindra Narayan*, AIR 1978 Cal 492, *C Seethaiah v Govt of A P.* AIR 1983 AP 443 *Employees Assn. v RBI* AIR 1981 AP 246

29. *G C Siddalingappa v G C Veeranna* AIR 1981 Kant 242 *C Seethaiah v Govt of A P.* AIR 1983 AP 443 *Kandla Port Trust v Mulraj*, (1986) 27 (1) GLR 442

*it is not permissible for the court to pass an interim order affecting the caveator, as otherwise it will defeat the very object of Section 148-A.*<sup>30</sup>

(emphasis supplied)

It also cannot be contended that the caveator is required to be heard not at the time of passing an *ex parte* order at the initial stage, but at the time of passing the final order.<sup>31</sup> This reasoning would make the provisions of Section 148-A nugatory and meaningless because, even in the absence of Section 148-A, before passing a final order the other side is always required to be heard. That is the requirement of natural justice.<sup>32</sup> Therefore, once a caveat is filed, it is the duty of the court to hear the caveator before passing any interim order against him.<sup>33</sup> But an interim order passed without hearing the caveator is not without jurisdiction and operates unless set aside.<sup>34</sup>

## 12. TIME-LIMIT

A caveat lodged under sub-section (1) will remain in force for ninety days from the date of its filing.<sup>35</sup>

After the prescribed period of ninety days is over, caveat may be renewed.<sup>36</sup>

30. *G C Siddalingappa v. G.C. Veeranna*, AIR 1981 Kant 242, at p. 244.

31. *Kandla Port Trust v. Mulraj*, (1986) 27 (1) GLR 442.

32. For detailed discussion about "Natural Justice" see, *Authors' Lectures on Administrative Law* (2012) Lecture VI.

33. *G.C. Siddalingappa v. G C. Veeranna*, AIR 1981 Kant 242; *C. Seethaiah v. Govt. of A.P.*, AIR 1983 AP 443; *Kandla Port Trust v. Mulraj*, (1986) 27 (1) GLR 442.

34. *Employees Assn. v. RBI*, AIR 1981 AP 246.

35. Sub-s. (5). See also, Statement of Objects and Reasons; *Pashupati Nath v. Registrar, Coop. Societies*, AIR 1983 Raj 191 at p. 192; *H.G. Shankar Narayan v. State of Rajasthan*, AIR 1985 Raj 156 at p. 159. 1984 Raj LW 266; *Enamul Horo v. Harbans Kaur*, (1995) 2 BLJR 1136.

36. *Ibid.*

## CHAPTER 4

# Inherent Powers of Courts

### SYNOPSIS

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### 1. GENERAL

Every court is constituted for the purpose of administering justice between the parties and, therefore, must be deemed to possess, as a necessary corollary, all such powers as may be necessary to do the right and to undo the wrong in the course of administration of justice.<sup>1</sup> As stated above,<sup>2</sup> the Code of Civil Procedure is a procedural or adjective law and the provisions thereof must be liberally construed to advance the cause of justice and further its ends.<sup>3</sup>

The inherent powers of the court are in addition to the powers specifically conferred on the court by the Code. They are *complementary* to those powers and the court is free to exercise them for the ends of justice or to prevent the abuse of the process of the court.<sup>4</sup>

1. *Manohar Lal Chopra v. Seth Hiralal*, AIR 1962 SC 527; 1962 Supp (1) SCR 450, *State of Punjab v. Shamlal Murari*, (1976) 1 SCC 719; AIR 1976 SC 1177, *Raj Narain v. Indira Nehru Gandhi*, (1972) 3 SCC 850 at p. 858; AIR 1972 SC 1302 at p. 1307, *Jaipur Mineral Development Syndicate v. CIT*, (1977) 1 SCC 508 at pp. 510-11; AIR 1977 SC 1348 at p. 1350, *Mulraj v. Murti Regnunathji Maharaj*, AIR 1967 SC 1386 (1967) 3 SCR 84, *State of U P v. Roshan Singh*, (2008) 2 SCC 488; AIR 2008 SC 1190. See also *supra*, Pt. I, Chap. 1.

2. See *supra*, Pt. I, Chap. 1.

3. *Ibid*.

4. S. 151 of the Code reads as follows:

*Saving of inherent powers of Court*—Nothing in this Code shall be deemed to limit or otherwise affect the inherent powers of the court to make such orders as

The reason is obvious. The provisions of the Code are not exhaustive for the simple reason that the legislature is incapable of contemplating all the possible circumstances which may arise in future litigation.<sup>5</sup> Inherent powers come to the rescue in such unforeseen circumstances. They can be exercised *ex debito justitiae* in absence of express provisions in the Code.<sup>6</sup>

As Justice Raghubar Dayal<sup>7</sup> rightly states, "The inherent power has not been conferred upon the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it." Thus, this power is necessary in the interests of justice. The inherent power has its roots in necessity and its breadth is coextensive with the necessity.<sup>8</sup> Sections 148 to 153-A of the Code enact the law relating to inherent powers of a court in different circumstances.

## 2. INHERENT POWER: MEANING

According to dictionary meaning, "inherent" means "natural", "existing and inseparable from something", "a permanent attribute or quality", "an essential element, something intrinsic, or essential, vested in or attached to a person or office as a right of privilege."<sup>9</sup>

Inherent powers are thus powers which may be exercised by a court to do full and complete justice between the parties before it.

## 3. INHERENT POWERS: SCHEME

Sections 148 to 153-B of the Code deal with inherent powers of courts. The scheme, however, is not based on intelligible pattern. Sections 148 and 149 provide for grant and enlargement of time while Section 151 preserves inherent powers of courts. Sections 152, 153 and 153-A deal

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may be necessary for the ends of justice or to prevent abuse of the process of the court."

See also *Padam Sen v. State of U P.*, AIR 1961 SC 218 at p. 219: (1961) 1 SCR 884 at p. 887; *Manohar Lal Chopra v. Seth Hiralal*, AIR 1962 SC 527: 1962 Supp (1) SCR 450; *Ram Chand & Sons Sugar Mills (P) Ltd. v. Kanhayalal Bhargava*, AIR 1966 SC 1899: (1966) 3 SCR 856; *Mulraj v. Murti Reghunathji Maharaj*, AIR 1967 SC 1386: (1967) 3 SCR 84.

5. *Manohar Lal Chopra v. Seth Hiralal*, AIR 1962 SC 527: 1962 Supp (1) SCR 450.
6. *Mahendra Mantilal v. Sushila Mahendra*, AIR 1965 SC 364 at p. 399: (1964) 7 SCR 267; *Manohar Lal Chopra v. Seth Hiralal*, AIR 1962 SC 527: 1962 Supp (1) SCR 450.
7. *Manohar Lal Chopra v. Seth Hiralal*, AIR 1962 SC 527: 1962 Supp (1) SCR 450; see also *State of W.B. v. Indira Debi*, (1977) 3 SCC 559.
8. *Newabganj Sugar Mills v. Union of India*, (1976) 1 SCC 120 at p. 123: AIR 1976 SC 1152 at p. 1155.
9. *Concise Oxford English Dictionary* (2002); *Chamber's 20th Century Dictionary* (1992) at p. 647; *Webster's Encyclopedic Unabridged Dictionary* (1994) at p. 732.

with amendments in judgments, decrees orders and in other proceedings. Section 152-B declares a place of trial to be an open court. Section

guarantee or sanction for obedience of the court's order but would not take away the court's jurisdiction to act according to the mandate of the statute or on relevant equitable considerations if the statute does not deny such consideration."<sup>15</sup>

Before extension of time is granted by a court, two conditions must be fulfilled:

- (i) A period must have been fixed or granted by the court; and
- (ii) Such period must be for doing an act prescribed or allowed by the Code.

The section has no application when the time has not been fixed or granted by the court or a particular act has not been prescribed or allowed by the Code.

The power conferred by the Code on the court is discretionary. The court "may" use it for securing the ends of justice. It cannot be claimed by the party as of right. Before exercising the power, therefore, the court may take into account all the facts and circumstances including the conduct of the applicant.<sup>16</sup>

## 5. PAYMENT OF COURT FEES: SECTION 149

Section 149 empowers the court to allow a party to make up the deficiency of court fees payable on a plaint, memorandum of appeal, etc. even after the expiry of the period of limitation prescribed for the filing of such suit, appeal, etc. Section 4 of the Court Fees Act, 1870 provides that no document chargeable with court fee under the Act shall be filed or recorded in any court of justice, unless the requisite court fee is paid.

Section 149 of the Code of Civil Procedure is a sort of proviso to that rule by allowing the deficiency to be made good within a period fixed by it. If the proper court fee is not paid at the time of filing of a memorandum of appeal, but the deficit court fee is paid within the time fixed by the court, it cannot be treated as time barred.<sup>17</sup> Thus, the defective document is *retrospectively* validated for the purposes of limitation as

- 15. *Chinnamarkathian v. Ayyavoo*, (1982) 1 SCC 159, at p. 169 (SCC): at p. 142 (AIR); *Jogdhayan v. Babu Ram*, (1983) 1 SCC 403, *Prem Narain v. Vishnu Exchange Charitable Trust*, (1984) 4 SCC 375: AIR 1984 SC 1896; *Advocate Bar Assn. (II) v. Union of India*, (2005) 6 SCC 344: AIR 2005 SC 3353.
- 16. *Chinnamarkathian v. Ayyavoo*, (1982) 1 SCC 159: AIR 1982 SC 137; *Ramesh Bejoy v. Pashupati Rai*, (1979) 4 SCC 27: AIR 1979 SC 1769; *Jogdhayan v. Babu Ram*, (1983) 1 SCC 26: AIR 1983 SC 57; *Johri Singh v. Sukh Pal Singh*, (1989) 4 SCC 403: AIR 1989 SC 2073.
- 17. *Mannan Lal v. Chhotaka Bibi*, (1970) 1 SCC 769 at pp. 775-77: AIR 1971 SC 1374 at pp. 1378-80; *Mahanth Ram Das v. Ganga Das*, AIR 1961 SC 882; *Mahasay Ganesh Prasad v. Narendra Nath*, AIR 1953 SC 431 at pp. 432-33. 17 Cut LT 73: 1951 KLT (SC) 28; *Jugal Kishore v. Dhanoo Devi*, (1973) 2 SCC 567: AIR 1973 SC 2508, *Indian Statistical Institute v. Associated Builders*, (1978) 1 SCC 483. AIR 1978 SC 335 at p. 340, *Mohd. Mahibulla v. Seth Chaman Lal*, (1991) 4 SCC 529: AIR 1993 SC 1241.

well as court fees.<sup>18</sup> The power, however, is discretionary and should be exercised, judiciously and in the interests of justice.<sup>19</sup>

## 6. TRANSFER OF BUSINESS: SECTION 150

Section 150 of the Code declares that where the business of any court is transferred to any other court, the transferee court will exercise same powers and discharge same duties conferred or imposed by the Code upon the transfer court.

## 7. ENDS OF JUSTICE: SECTION 151

The inherent powers saved by Section 151 can be used to secure the ends of justice.<sup>20</sup> Thus, the court can recall its own orders and correct mistakes;<sup>21</sup> can set aside an *ex parte* order passed against the party;<sup>22</sup> can issue temporary injunctions in cases not covered by the provisions of Order 39;<sup>23</sup> can add, delete or transpose any party to a suit;<sup>24</sup> can set aside illegal orders or orders passed without jurisdiction;<sup>25</sup> can revive execution applications;<sup>26</sup> can take notice of subsequent events;<sup>27</sup> can hold trial *in camera* or prohibit excessive publication of its proceedings;<sup>28</sup> can allow amendments of pleadings;<sup>29</sup> can correct errors

18. *Mahasay Ganesh Prasad v. Narendra Nath*, AIR 1953 SC 431; *Mahanth Ram Das v. Ganga Das*, AIR 1961 SC 882; *Jugal Kishore v. Dhanoo Devi*, (1973) 2 SCC 567.
19. *Scheduled Caste Coop. Land Owning Society Ltd v. Union of India*, (1991) 1 SCC 174; AIR 1991 SC 730; *Indian Statistical Institute v. Associated Builders*, (1978) 1 SCC 483; *Mahasay Ganesh Prasad v. Narendra Nath*, AIR 1953 SC 431; *K.C. Skaria v. Govt. of State of Kerala*, (2006) 2 SCC 285; AIR 2006 SC 811.
20. *Manohar Lal Chopra v. Seth Hiralal*, AIR 1962 SC 527; 1962 Supp (1) SCR 450; *Raja Soap Factory v. S.P. Shantharaj*, AIR 1965 SC 1449; (1965) 2 SCR 800; *Nareesh Shridhar v State of Maharashtra*, AIR 1967 SC 1 at p. 8; (1966) 3 SCR 744; *Jaipur Mineral Development Syndicate v. CIT*, (1977) 1 SCC 508 at pp 510-11; AIR 1977 SC 1348 at p 1350; *Mulraj v. Murti Reghunathi Maharaj*, AIR 1967 SC 1386; (1967) 3 SCR 84; *Nair Service Society Ltd. v. K.C. Alexander*, AIR 1968 SC 1165 at p. 1178. (1968) 3 SCR 163; *All Bengal Excise Licensees' Assn. v. Raghavendra Singh*, (2007) 11 SCC 374 AIR 2007 SC 1386
21. *Keshardeo v. Radha Kissen*, AIR 1953 SC 23 at pp 26-27; 1953 SCR 136
22. *Martin Burn Ltd. v. R.N. Banerjee*, AIR 1958 SC 79 at p. 83; 1958 SCR 514.
23. *Manohar Lal Chopra v. Seth Hiralal*, AIR 1962 SC 527; 1962 Supp (1) SCR 450.
24. *Sarla Bala Dassi v. Nirmala Sundari Dassi*, AIR 1958 SC 394 at p 398; 1958 SCR 1287
25. *Keshardeo v. Radha Kissen*, AIR 1953 SC 23; *B.V. Patankar v. C G Sastry*, AIR 1961 SC 272 at p. 275. (1961) 1 SCR 591; *Mulraj v. Murti Reghunathi Maharaj*, AIR 1967 SC 1386 (1967) 3 SCR 84
26. *Kumar Daulat Singh v. Prahlad Rai*, (1979) 4 SCC 326 AIR 1979 SC 1818.
27. *Nair Service Society Ltd v K C Alexander*, AIR 1968 SC 1165, at pp 1177-78 (AIR) *Shikharchand Jain v Digamber Jain Praband Karini Sabha*, (1974) 1 SCC 675 AIR 1974 SC 1178
28. *Nareesh Shridhar v State of Maharashtra*, AIR 1967 SC 1, at p 11 (AIR)
29. For detailed discussion, see *supra*, Pt II Chap. 6

and mistakes;<sup>30</sup> can expunge remarks made against a judge;<sup>31</sup> can extend time for payment of court fees;<sup>32</sup> can extend time to pay arrears of rent;<sup>33</sup> can restore the suit and rehear it on merits;<sup>34</sup> can review its orders,<sup>35</sup> etc. What would meet the ends of justice would always depend upon the facts and circumstances of each case and the requirements of justice.<sup>36</sup>

## 8. ABUSE OF PROCESS OF COURT: SECTION 151

The inherent powers under Section 151 can also be exercised to prevent the abuse of the process of a court.<sup>37</sup> Such abuse may be committed by a court or by a party. Where a court employs a procedure in doing something which it never intended to do and there is miscarriage of justice, there is an abuse of process by the court itself. The injustice so done to the party must be remedied on the basis of the doctrine *actus curiae neminem gravabit* (an act of the court shall prejudice no one).<sup>38</sup> Similarly, a party to a litigation may also be guilty of an abuse of the process of the court, e.g. by obtaining benefits by practising fraud on the court;<sup>39</sup> or upon a party to the proceedings;<sup>40</sup> or by circumventing the statutory provisions;<sup>41</sup> or by resorting to or encouraging

30. *L. Janakirama Iyer v. P.M. Nilakanta Iyer*, AIR 1962 SC 633 at p. 643. 1962 Supp (1) SCR 206; *Samarendra Nath v. Krishna Kumar*, AIR 1967 SC 1440 at p. 1443; (1967) 2 SCR 18.
31. *State of Assam v. Ranga Muhammad*, AIR 1967 SC 903 at pp. 907-08. (1967) 1 SCR 454.
32. *Mahanth Ram Das v. Ganga Das*, AIR 1961 SC 882; (1961) 3 SCR 763.
33. *Chinnamarkathian v. Ayyavoo*, (1982) 1 SCC 159; AIR 1982 SC 137.
34. *Jaipur Mineral Development Syndicate v. CIT*, (1977) 1 SCC 508; AIR 1977 SC 1348; *Lachi Tewari v. Director of Land Records*, 1984 Supp SCC 431; AIR 1984 SC 41.
35. *Shivdeo Singh v. State of Punjab*, AIR 1963 SC 1909 at p. 1911. See also, Author's *Lectures on Administrative Law* (2008) Lecture VII.
36. *Per Gajendragadkar, C.J.* in *Naresh Shridhar v. State of Maharashtra*, AIR 1967 SC 1 at p. 8; (1966) 3 SCR 744.
37. *Manohar Lal Chopra v. Seth Hiralal*, AIR 1962 SC 527. 1962 Supp (1) SCR 450; *Raja Soap Factory v. S.P. Shantharaj*, AIR 1965 SC 1449 at p. 1450; *Ram Chand case*, AIR 1966 SC 1899 at p. 1902; *Naresh Shridhar v. State of Maharashtra*, AIR 1967 SC 1 at p. 11; *Jaipur Syndicate case*, (1977) 1 SCC 508 at p. 510; AIR 1977 SC 1348, at p. 1350.
38. *Kanai Lal Shaw v. Bhathu Shaw*, C.A. 151 of 1963, decided on 3-5-1965 (SC) (unrep); *Forasol v. ONGC*, 1984 Supp SCC 263 at pp. 295-96. AIR 1984 SC 241 at pp. 259-60. For detailed discussion, see *supra*, "Restitution", Chap. 2.
39. *Dadu Dayal Mahasabha v. Sukhdev Arya*, (1990) 1 SCC 189; *U.P. Junior Doctors' Action Committee v. Dr. B. Sheetal Nandwani*, (1990) 4 SCC 633. AIR 1991 SC 909; *Baidyanath Dubey v. Deonandan Singh*, 1968 SCD 275.
40. *Dadu Dayal v. Sukhdev Arya*, (1990) 1 SCC 189; *Sadho Saran v. Anant Rai*, AIR 1923 Pat 483; ILR (1923) 2 Pat 731.
41. *Manilal Mohanlal v. Sardar Sayed Ahmed*, AIR 1954 SC 349; (1955) 1 SCR 108; *Jibon Krishna v. New Beerbhum Coal Co. Ltd.*, AIR 1960 SC 297 at pp. 299-300; (1960) 2 SCR 198; *Manohar Lal Chopra v. Seth Hiralal*, AIR 1962 SC 527. 1962 Supp (1) SCR 450. See also, *Forasol v. ONGC*, 1984 Supp SCC 263, *Cotton Corpn. of India Ltd. v. United Industrial Bank Ltd.*, (1983) 4 SCC 625; AIR 1983 SC 1272.

multiplicity of proceedings;<sup>42</sup> or by instituting vexatious, obstructive or dilatory tactics;<sup>43</sup> or by introducing scandalous or objectionable matter in proceedings;<sup>44</sup> or by trying to secure an undue advantage over the opposite party,<sup>45</sup> etc.

## 9. AMENDMENT OF JUDGMENTS, DECREES, ORDERS AND OTHER RECORDS: SECTIONS 152, 153-153-A

Section 152 enacts that clerical or arithmetical mistakes in judgments, decrees or orders arising from any accidental slip or omission may at any time be corrected by the court either of its own motion (*suo motu*) or on the application of any of the parties.<sup>46</sup> The section is based on two important principles:<sup>47</sup> (i) an act of court should not prejudice any party;<sup>48</sup> and (ii) it is the duty of courts to see that their records are true and they represent the correct state of affairs.<sup>49</sup>

In the words of Bowen, L.J., "Every court has inherent power over its own records so long as those records are within its power and that it can set right any mistake in them. An order even when passed and entered may be amended by the court so as to carry out its intention and express the meaning of the court when the order was made."<sup>50</sup> It can be done at any time.<sup>51</sup>

### *Illustrations*

(1) A files a suit against B for Rs 10,000 in court X. The court passes a decree for Rs 1000 "as prayed". The decree can be amended under this section.

42. *Nair Service Society Ltd. v. K.C. Alexander*, AIR 1968 SC 1165 at pp. 1177-78 (1968) 3 SCR 163.

43. *Jethabhai Versy and Co. v. Amarchand Madhavji and Co.*, AIR 1924 Bom 90, *Mula v. Babu Ram*, AIR 1960 All 573 at pp. 575-76.

44. *Shankarlal v Ramniklal*, AIR 1951 Kant 23

45. *Yasin Ali v. Ali Bahadur*, AIR 1924 Oudh 230; *Director of Inspection (Intelligence) v Vinod Kumar Didwania*, (2008) 14 SCC 91; AIR 1987 SC 1260; *V Ramakrishna v N Sarojini*, AIR 1993 AP 147; *Rajappa Hanamantha Ranoji v. Mahadev Channabasappa*, (2000) 6 SCC 120; AIR 2000 SC 2108.

46. *Master Construction Co (P) Ltd v. State of Orissa*, AIR 1966 SC 1047 at p 1049 (1966) 3 SCR 99; *Samarendra Nath v. Krishna Kumar*, AIR 1967 SC 1440 at p 1443 (1967) 2 SCR 18, *Ram Kumar v. Union of India*, (1991) 2 SCC 247, *Special Land Acquisition Officer v Dharmaraddi Venkatearaddi*, (2005) 13 SCC 262; AIR 2005 SC 4099, *Director (L.A.) v. Malla Atchinaidu*, (2006) 12 SCC 87

47. *Bishnu Charan Das v Dhani Biswal*, AIR 1977 Ori 68 at p 69

48. *Tulsipur Sugar Co Ltd v State of U.P.*, (1969) 2 SCC 100 at p 106-07 AIR 1970 SC 70 at pp 75-76. See also *supra* Chap 2

49. *Samarendra Nath v Krishna Kumar* AIR 1967 SC 1440 at p 1443 (1967) 2 SCR 18

50. *Mellor v Swire*, (1885) 30 Ch D 239 (CA) *Samarendra Nath v Krishna Kumar* AIR 1967 SC 1440, *L Janakirama Iyer v P.M. Nalakanta Iyer* AIR 1962 SC 633 1962 Supp (1) SCR 206

51. Ss 152, 153.

(2) A files a suit against B for Rs 10,000 and interest in court X. The court passes a decree for Rs 5000 only and nothing more. A applies to amend the decree by adding a prayer for payment of interest. The decree cannot be amended under this section. If aggrieved by the decree, A may file an appeal or application for review

Section 153-A as inserted by the Amendment Act of 1976 provides that where the appellate court dismisses an appeal summarily under Order 41 Rule 11, the power of amendment under Section 152 can be exercised by the court of first instance.<sup>52</sup>

Section 152 is confined to amendments of judgments, orders or decrees. Order 6 Rule 17 deals with amendments of pleadings.<sup>53</sup> Section 153, however, confers a general power on the court to amend defects or errors in "any proceeding in a suit" and to make all necessary amendments for the purpose of determining the real question at issue between the parties to the suit or other proceeding.<sup>54</sup>

## 10. LIMITATIONS

It is true that the inherent powers of the court are very wide and residuary in nature and they are in addition to the powers specifically conferred on the court by the Code. It is, however, equally true that these inherent powers can be exercised *ex debito justitiae* only in the absence of express provisions in the Code.<sup>55</sup> They cannot be exercised in conflict with what had been expressly provided in the Code or against the intentions of the legislature.<sup>56</sup> If there are express provisions exhaustively covering a particular topic, they give rise to a necessary implication that no power shall be exercised in respect of the said topic otherwise than in the manner prescribed by the said provisions.<sup>57</sup> Again, the inherent powers are to be exercised by the court in very

52. See also *L. Janakirama Iyer v. P. M. Nilakanta Iyer*, AIR 1962 SC 633.

53. For detailed discussion, see *supra*, Pt II, Chap. 6

54. *Jai Jai Ram Manohar v. National Building Material Supply*, (1969) 1 SCC 869; AIR 1969 SC 1267; *Purushottam Umedbhai & Co v. Manilal & Sons*, AIR 1961 SC 325 at pp. 329-30; (1961) 1 SCR 982, *Ramkarandas v. Bhagwandas*, AIR 1965 SC 1144; (1965) 2 SCR 186.

55. *Mahendra Manilal v. Sushila Mahendra*, AIR 1965 SC 364 at p. 399; (1964) 7 SCR 267; *Manohar Lal Chopra v. Seth Hiralal*, AIR 1962 SC 527. 1962 Supp (1) SCR 450, *Nani Singh v. Koonwarjee*, (1970) 1 SCC 732 at pp. 734-35. AIR 1970 SC 997 at p. 998, *Arjun Singh v. Mohindra Kumar*, AIR 1964 SC 993 (1964) 5 SCR 946, 76, 118, 122, 270, 271, 273, 278, 346, 532, 533

56. *Arjun Singh v. Mohindra Kumar*, AIR 1964 SC 993 (1964) 5 SCR 946, 76, 118, 122, 270, 271, 273, 278, 346, 532, 533, *Manohar Lal Chopra v. Seth Hiralal*, AIR 1962 SC 527 1962 Supp (1) SCR 450, *Durgesh Sharma v. Jayshree*, (2008) 9 SCC 648

57. *Ram Chand & Sons Sugar Mills (P) Ltd. v. Kanhayalal Bhargava*, AIR 1966 SC 1899; (1966) 3 SCR 856.

exceptional circumstances.<sup>58</sup> The restrictions on the inherent powers are not because they are controlled by the provisions of the Code, but because it should be presumed that the procedure provided by the legislature is dictated by the interests of justice.<sup>59</sup>

Thus, in the exercise of inherent powers a court cannot invest itself with jurisdiction not vested in it by law;<sup>60</sup> or grant an order of stay circumventing the provisions of Section 10 of the Code;<sup>61</sup> or allow set-off in execution proceedings at the instance of an auction-purchaser, ignoring the provisions of Order 21 Rule 84;<sup>62</sup> or remand a case, ignoring the provisions of Order 41 Rules 23 and 25;<sup>63</sup> or reopen the questions which had already been heard and finally decided by it and which are consequently barred by the general principles of *res judicata*;<sup>64</sup> or appoint a Commissioner keeping aside the provisions of Section 75;<sup>65</sup> or review its orders or judgments in the absence of statutory provisions;<sup>66</sup> or direct an arbitrator to make a fresh award;<sup>67</sup> or set aside an *ex parte* decree, ignoring the provisions of Order 9 Rule 9 or 13;<sup>68</sup> or override substantive rights of any party;<sup>69</sup> or restrain any party from taking proceeding in a court of law;<sup>70</sup> or implead legal representatives on record after the suit is abated;<sup>71</sup> or make an order restraining execution of the decree against the surety;<sup>72</sup> or set aside an order which was right when it was made,<sup>73</sup> etc.

58. *Manohar Lal Chopra v. Seth Hiralal*, AIR 1962 SC 527; 1962 Supp (1) SCR 450. *Ramkarandas v. Bhagwandas*, AIR 1965 SC 1144 at p. 1145; (1965) 2 SCR 186.

59. *Manohar Lal Chopra v. Seth Hiralal*, AIR 1962 SC 527; 1962 Supp (1) SCR 450.

60. *Raja Soap Factory v. S.P. Shantharaj*, AIR 1965 SC 1449 (1965) 2 SCR 800; *State of W B v. Indira Debi*, (1977) 3 SCC 559.

61. *Manohar Lal Chopra v. Seth Hiralal*, AIR 1962 SC 527. 1962 Supp (1) SCR 450.

62. *Manilal Mohanlal v. Sardar Sayed Ahmed*, AIR 1954 SC 349. (1955) 1 SCR 108

63. *Mahendra Manilal v. Sushila Mahendra*, AIR 1965 SC 364, at p. 399 (AIR); *Nain Singh v. Koonwarjee*, (1970) 1 SCC 732 at pp. 734-35 AIR 1970 SC 997 at p. 998, see also *supra*, Pt. III, Chap. 2

64. *Rikhabdass v. Ballabhdas*, AIR 1962 SC 551 at p. 554 1962 Supp (1) SCR 475, *Union of India v. Ram Charan*, AIR 1964 SC 215 at p. 218 (1964) 3 SCR 467

65. *Padam Sen v. State of U P.*, AIR 1961 SC 218 at p. 220 (1961) 1 SCR 884

66. For detailed discussion, see *supra*, Pt. III, Chap. 8

67. *Rikhabdass v. Ballabhdas*, AIR 1962 SC 551 at p. 554 1962 Supp (1) SCR 475

68. *Arjun Singh v. Mohindra Kumar*, AIR 1964 SC 993 (1964) 5 SCR 946, 76, 118, 122, 270, 271, 273, 278, 346, 532, 533

69. *Padam Sen v. State of U P.*, AIR 1961 SC 218 (1961) 1 SCR 884, *Manohar Lal Chopra v. Seth Hiralal*, AIR 1962 SC 527 1962 Supp (1) SCR 450

70. *Manohar Lal Chopra v. Seth Hiralal*, AIR 1962 SC 527 1962 Supp (1) SCR 450

71. *Union of India v. Ram Charan*, AIR 1964 SC 215 (1964) 3 SCR 467

72. *Bank of Bihar Ltd. v. Dr. Damodar Prasad*, AIR 1969 SC 297 at p. 209 (1969) 1 SCR 620

73. *A C. Estates v. Scrajuddin & Co.*, AIR 1966 SC 935 at p. 939 (1966) 1 SCR 235

## 11. CONCLUDING REMARKS

Sections 148 to 153-B of the Code invest courts with very wide and extensive powers to minimize litigation, avoid multiplicity of proceedings and to render full and complete justice between the parties before them. Section 151 of the Code is a salutary provision and saves inherent powers of a court, which are to be exercised *ex debito justitiae* (in the interest of justice). They have not been conferred upon the court. They are inherent in every court by virtue of its duty to do justice to the cause.

It is submitted that the following observations of Subba Rao, J. (as he then was) in the case of *Ram Chand & Sons Sugar Mills (P) Ltd. v. Kanhayalal Bhargava*<sup>74</sup> lay down the correct principle regarding the ambit and scope of the inherent powers of a court under Section 151 of the Code; wherein His Lordship after considering all the leading cases on the subject pronounced:

"The inherent power of a court is in addition to and complimentary to the powers expressly conferred under the Code. But that power will not be exercised if its exercise is inconsistent with, or comes into conflict with, any of the powers expressly or by necessary implication conferred by the other provisions of the Code. If there are express provisions exhaustively covering a particular topic, they give rise to a necessary implication that no power shall be exercised in respect of the said topic otherwise than in the manner prescribed by the said provisions. *Whatever limitations are imposed by construction on the provisions of Section 151 of the Code, they do not control the undoubted power of the court conferred under Section 151 of the Code to make a suitable order to prevent the abuse of the process of the court.*"<sup>75</sup>

(emphasis supplied)

74. AIR 1966 SC 1899: (1966) 3 SCR 856.

75. *Ibid*, at p. 1902 (AIR).

## CHAPTER 5

# Delay in Civil Litigation

*"Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated, that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have been married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why.... Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out... but Jarndyce and Jarndyce still drags its dreary length before the Court, perennially hopeless."*

—Charles Dickens (BLEAK HOUSE)

### SYNOPSIS

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### 1. GENERAL

One of the most vexed and worrying problems in the administration of civil justice is of delay. Jonathan Swift in his famous work *Gulliver's Travels* sarcastically describes the delay in courts in the following words

"In pleading, they (lawyers) studiously avoid entering into the *merits* of the cause, but are loud, violent and tedious in dwelling upon all *circumstances* which are not to the purpose... they never desire to know what claim or title my adversary hath to my cow, but whether the said cow were

red or black; her horns long or short; whether the field I graze her in be round or square; whether she were milked at home or abroad; what diseases she is subject to; and the like; after which they consult the *precedents*, adjourn the cause from time to time, and in ten, twenty or thirty years come to an *issue*.

It is likewise to be observed that this society hath a peculiar cant and jargon of their own, that no other mortal can understand, and wherein all their laws are written; which they take special care to multiply; whereby they have wholly confounded the very essence of truth and falsehood; of right and wrong; so that it will take thirty years to decide whether the field, left by my ancestors for six generations, belong to me or to a stranger three hundred miles off."

## 2. DANGERS OF DELAY

Delay in disposal of case threatens justice. The lapse of time blurs truth, weakens memory of witnesses and makes presentation of evidence difficult. This leads to loss of public confidence in the judicial process which in itself is a threat to Rule of Law and consequently to the Democracy. The rising costs of litigation can also be said to be attributable to delay which in turn causes the litigants to either abandon meritorious claims or compromise for a lesser or unjust settlement out of court. Besides, expression of society's moral outrage is essential in an ordered society that asks its members to rely on legal process rather than self-help to vindicate wrongs. To avoid anarchy, fairness has to be actually felt by the aggrieved persons and it is the court which provides the systematic outlet. Obedience to law has been described as the strongest of all the forces making for a nation's peaceful existence and progress.<sup>1</sup>

## 3. CAUSES OF DELAY

As remarked earlier, procedure is the handmaid of justice. It is to be used so as to advance the cause of justice and not to thwart it. An essential requirement of justice is that it should be dispensed as quickly as possible. It is a well-known adage that "justice delayed is justice denied". However, delay in litigation is equally proverbial and, though it may sound paradoxical, the fact remains that the very provisions of the Code which are designed to facilitate smooth and speedy trial of cases are misused and abused in order to delay cases indefinitely and ultimate success in the cause often proves illusory. The result is that cases pile up and a huge backlog accumulates in all courts. The problem of backlog and delay in litigation has been engaging the attention of the Law Commission for a long time and as a result of its recommendations,

1. Law Commission's One Twenty-seventh Report at para 2.15.

made from time to time, fairly extensive changes have been made in the provisions of the Code in 1976 with a view to removing the causes of delay. However, those changes seemed to have had little impact, more changes, therefore, made by the Amendment Acts of 1999 and 2002.

A number of causes seem to be responsible for this sorry state of affairs. An attempt has been made here to identify some of the causes and suggest measures to remove them. It appears that the main causes of delay are as follows:

(1) *Increase in litigation.*—A glance through the figures of cases filed in courts over a number of years would clearly show that litigation has been increasing phenomenally in the country. Whatever may be the causes of this increase, and it would be beyond the scope of this book to go into them, the fact remains that courts are over flooded with cases and though more and more courts are being set up, the increase in their number is not sufficient to keep pace with the increased number of cases.

(2) There is a general feeling that the Government is not appointing a sufficient number of judges to deal with the increasing work. It is a common experience that even existing vacancies in various High Courts remain unfilled for an unduly long time. Prompt appointment of judges to fill the existing vacancies and creation of additional posts in sufficient number would go a long way to solve the problem of delay and arrears.

(3) Much of the delay occurs because the provisions of the Code are not properly observed and followed. After filing a plaint, the process fee is not paid for a long time so that summons to the defendant is not served in time. After a defendant makes his appearance, his advocate often seeks long adjournments to file the written statement. After the pleadings are closed, there comes the stage of producing documentary evidence before issues are settled but nobody bothers to produce documentary evidence at this stage. Little use is made of the provisions for discovery and inspection of documents and for serving interrogatories. If these provisions are properly used, the controversy between the parties can often be narrowed before the parties go to trial. However, what usually happens is that when the suit comes for trial, the advocates sit down in the court, open their briefs, probably for the first time, and begin laboriously to prepare lists of documents, etc. All the while the poor judge sits idly on the Bench, helplessly looking on. Countless hours are wasted in this way.

(4) It is a matter of common knowledge that in a large number of cases coming before the High Courts and the Supreme Court, the dispute is about the interpretation of the legislative enactment in question. The increase in the number of such cases is due to several reasons

There has been a vast expansion of the functions and activities of the State in all spheres with a corresponding increase in the number of laws enacted every year. But there is no reason why mere increase in the number of laws should by itself give rise to increase in litigation. Unfortunately, however, the laws are often hastily drafted with the result that the drafting is often loose and leaves great scope for lawyers to raise arguments about their interpretation. The difficulty of interpreting laws is often compounded by frequent and thoughtless amendments which, though intended to clarify the intention of the legislature, often fails to achieve the designed object and on the contrary results in greater confusion. The words of a statute are not inaugural words but words of valediction. "The problem has been tackled, long live the problem" is the message of most progressive legislations in India.<sup>2</sup>

In the case of *Zinabhai v. State of Gujarat*<sup>3</sup> considering the provisions of the Gujarat Panchayats Act, 1961, the High Court of Gujarat observed as under:

"It is an extraordinary and unique piece of legislation framed without much scientific accuracy of language and many of its provisions are so unhappily worded that it is difficult to penetrate their confusion and obscurity. This is not the first time that we are called upon to face the complexities of this legislation and, with our growing acquaintance with its provisions, *we must confess to a feeling of reluctant respect which one feels for an old tough sparring partner whom one has never been able to knock out.*"<sup>4</sup>

(emphasis supplied)

(5) After the High Courts are empowered under Article 226 of the Constitution of India to issue prerogative writs and after the definition of "State" being liberally interpreted by the Supreme Court<sup>5</sup> so as to include the Union Government, State Governments, statutory corporations, nationalised banks, universities and any authority which is an instrumentality or agency of the Government, there is a soaring rise in litigation against the Government, with the result that today the Government is probably the biggest litigant in the country. The inefficiency of the Governmental machinery has naturally been responsible for considerable delay in disposal of cases where the Government is a party.

2. Prof Upendra Baxi, "Judicial Discourse: Dialectics of the face and the mask", 1993 JILI 1 at p. 3.

3. (1972) 13 Guj LR 1.

4. *Ibid*, at p. 2 (per Bhagwati, C.J.).

5. *Rajasthan SEB v. Mohan Lal*, AIR 1967 SC 1857; (1967) 3 SCR 377, *Sukhdev Singh v. Bhagatram Sardar Singh*, (1975) 1 SCC 421; AIR 1975 SC 1331; *Som Prakash Rekhi v. Union of India*, (1981) 1 SCC 449; AIR 1981 SC 212, *Ajay Hasia v. Khalid Mujib*, (1981) 1 SCC 722; AIR 1981 SC 487; *Central Inland Water Transport Corpn. v. Brojo Nath Ganguly*, (1986) 3 SCC 156; AIR 1986 SC 1571.

The judiciary is often criticised, in and out of Parliament, for mounting arrears of cases. What is forgotten, however, is the fact that the Government itself is responsible for the major portion of delay. The judiciary is not in a position to give a public reply to the criticism levelled against it. However, in the case of *State of Maharashtra v. G.A. Pitre*<sup>6</sup>, Chief Justice Chandrachud, while dealing with a case involving gross delay on the part of the Government, took occasion to draw public attention to this aspect of the problem in the following words:

"We consider this as a deplorable state of affairs. It is a matter of deep concern and regret that despite specific directions given by this court from time to time and despite numerous adjournments granted at the instance of the Government of Maharashtra over a period of 21 months, the Government has not bothered to give any attention to this matter whatsoever. We do not know whether the parties have been heard by the State Government as directed by us and, if so, why the decision is not being divulged. We are unable to understand that the State Government is unable to take any decision in the matter 'in view of the Assembly Session'. The fact that the Legislative Assembly is in session is no reason or justification for the Executive to neglect to discharge its imperative functions. We do not believe that the entire administration of the State of Maharashtra has come to a grinding halt on account of the fact that the Legislative Assembly is in session. And we do not believe, and would like to take this opportunity to give clear and strong expression to our view, that the State Government has hit upon a totally untenable excuse in order to explain away its indefensible indifference to a matter which has been hanging fire for 21 months. This court received inquiries from time to time from the Secretariat of Parliament in connection with questions put by members of Parliament regarding pendency of arrears in various courts and the reasons for delay caused in disposing of court cases. The Special Leave Petition before us is a speaking example of how delays occur in administering justice. *We hope that, if and when any Hon'ble Member of the State Legislature puts a question as to law's delays, the State Government, in fairness to this court, will cite the career of this unfortunate Special Leave Petition as a telling example.*"<sup>7</sup>

(emphasis supplied)

The learned Chief Justice, however, did not choose to follow the easy path of dismissing the case (Special Leave Petition) of the Government and thereby reduce the arrears, but in a gesture of magnanimity went on to observe:

"We should have dismissed the Special Leave Petition filed by the State of Maharashtra for reasons stemming from its total unconcern with a matter which it has itself brought to this court. But, temper has no place in the scheme of justice and we cannot refuse to do justice to the parties by applying mechanically the frustrating adage that 'justice delayed is justice denied'. *Experience has it that it is at least marginally more satisfactory*

6 (1982) 2 SCC 447 AIR 1982 SC 1196

7 *Id.* at pp 448-49 (SC) at p 1197 (AIR)

*to do justice even after a prolonged delay than to perpetrate injustice in quest of speed."*<sup>8</sup>  
(emphasis supplied)

(6) The attitude of some lawyers is also to some extent responsible for delay. In many cases, where the plaintiff has obtained *interim* or *ad interim* relief, he is naturally interested in delaying the proceedings so that stay or injunction is continued as far as possible. Similarly, where the defendant has no defence, he is naturally interested in prolonging the trial with a view to put off the evil day as long as possible. It is the ingenuity of advocates in taking advantage of technicalities which helps defendants in such cases. Lawyers are also known to apply for frequent adjournments on flimsy grounds. When a particular ground, such as his sickness or personal problem, is advanced by the advocate, it is usually not possible for a judge to examine whether the ground is genuine or not and it is in the fitness of things that he should normally accept as true what an advocate says. However, when this is the position, it is equally the duty of lawyers not to seek adjournments on flimsy or non-existent grounds. It is not suggested that such practices are widespread and that a majority of lawyers indulge in such tactics. But it cannot be denied that, as in every profession, there are unscrupulous elements in the legal profession too and that they are responsible for much of the delay in litigation.

(7) If lawyers are able to prolong litigation by resorting to one ruse or another, the question naturally arises, why do judges allow lawyers to take advantage of procedural technicalities and prolong litigation? The answer is that judges often show themselves unable to exercise sufficient control over proceedings being conducted before them. The judges in our country have a reputation for honesty and integrity. But that is not enough. It is an unfortunate fact that, owing to a variety of circumstances, this is not the place to go into them: judges are not drawn from the most talented members of the Bar. The result is that those who are much junior in practice find themselves appointed as judges and quite often they are not able to control senior members of the Bar. They lack the experience and maturity required of a judge. Their grasp of law and fact leaves much to be desired. They are unable to impress senior members of the Bar who often possess much stronger personalities than the judges. They tend to avoid "heavy matters". Senior advocates know very well that when they apply for adjournment in a "heavy matter", the judge is sure to grant it, though after making a great show of being inconvenienced and lecturing the advocate about the matter being old. Often the judge has not read the papers at home and when an advocate cites ruling after ruling, the judge gets lost and the hearing becomes very lengthy. If the judge is well-versed in law and is quick to grasp

8. *Ibid.*, at pp. 448-49 (SCC). at p. 1197 (AIR) See also, M.C. Chagla, *Roses in December* (1973) at pp. 70-71, 126-27.

facts, he can immediately pull up the advocate and cut short irrelevant arguments. Mere increase in the number of judges will not solve the problem. What is necessary is that experienced lawyers with a strong personality and character should be induced to accept appointment as judges so that the Bar looks up to the Bench and not down upon it.

#### 4. POSITION PRIOR TO AMENDMENT ACTS

As stated above,<sup>9</sup> before 1859 there was no uniform Code of Civil Procedure in India. After 1859, uniform Codes of Civil Procedure were enacted but they were also defective and unsatisfactory. Therefore, in the year 1908, the present Code was enacted. Though it had worked satisfactorily, all the problems were not solved. The Law Commission in its Report<sup>10</sup> observed:

"Although the provisions of the Code of Civil Procedure, 1908 are basically sound, it cannot be gainsaid that in view of the appalling backlog of cases which has unfortunately become a normal feature of nearly all the courts of the country, the problem of delay in law courts has assumed great importance."

There used to be delay at all the three important stages: delay up to passing of the decree, e.g. delay in the matter of issuing summons to the parties and witnesses; filing of written statements; framing of issues and even in pronouncement of judgment. Similarly, there was delay in First Appeals, Second Appeals, Revisions, etc. because of the language employed in the relevant provisions of the Code. With regard to execution proceedings, as early as the year 1872, the Privy Council<sup>11</sup> had to observe thus, "The difficulties of a litigant in India begin when he has obtained a decree." Later, in the case of *Babu Lal v. Hazari Lal*<sup>12</sup>, the Supreme Court has also observed, "The difficulty of the decree-holder starts in getting possession in pursuance of the decree obtained by him. The judgment-debtor tries to thwart the execution by all possible objections."<sup>13</sup> In the case of *Kuer Jang Bahadur v. Bank of Upper India Ltd.*<sup>14</sup>, the High Court of Oudh had to utter a word of caution, "Courts in India have to be careful to see that process of the court and law of procedure are not abused by judgment-debtors in such a way as to make courts of law instrumental in defrauding creditors, who have obtained decrees in accordance with their rights"

9 See *supra*. Pt I, Chap. 1.

10 Law Commission's Fourteenth Report Vol I at p. 263

11 *Court of Wards v. Coomar Ramput*, (1872) 14 MIA 605 at p. 612 17 WR 195 (PC)

12 (1982) 1 SCC 525 AIR 1982 SC 818, see also *Shyam Singh v. Collector Distt. Hamirpur* 1993 Supp (1) SCC 693 at p. 700

13 *Ibid* at p. 539 (SCC ) at p. 826 (AIR)

14 AIR 1925 Oudh 448 at p. 449

In *Marshall Sons & Co. (I) Ltd. v. Sahi Oretrans (P) Ltd.*<sup>15</sup>, the Supreme Court commented, "Because of the delay unscrupulous parties to the proceedings take undue advantage and the person who is in wrongful possession draws delight in delay in disposal of the case by taking undue advantage of procedural complications. It is also a known fact that after obtaining a decree for possession of immovable property, its execution takes a long time."

Again, in *N.S.S. Narayana Sarma v. Goldstone Exports (P) Ltd.*,<sup>16</sup> the Supreme Court highlighted the plight of decree-holder thus:

"It is a general impression prevailing amongst the litigant public that the difficulties of a litigant are by no means over on his getting a decree for immovable property in his favour. Indeed, his difficulties in real and practical sense, arise after getting the decree." (emphasis supplied)

## 5. AMENDMENTS OF 1976

It must be conceded that by the Amendment Act of 1976, extensive changes were made in the Code of Civil Procedure, 1908, all designed to avoid delay at every level. The necessary amendments were made in the provisions relating to appearance of parties, filing of written statements, production of documents, issue of summons, framing of issues, examination of parties, summoning and enforcing attendance of witnesses, adjournments and pronouncement of judgment. The right of appeal and revision has been considerably curtailed. Execution proceedings have also been made more effective. Over and above these changes, certain important changes have also been effected, e.g. widening of the doctrine of *res judicata*, summary procedure, specific provisions relating to set-off and counterclaim, garnishee order, appeal by indigent persons, costs for vexatious litigation, exemption from attachment of certain properties, legal aid to indigent suitors, etc.

## 6. AMENDMENTS OF 1999 AND 2002

The amendments made in 1976 were not found sufficient. In pursuance of the recommendations made by Justice Malimath Committee, extensive changes have been made in 1999 and 2002 in the provisions relating to issuance of summons, filing of written statement, amendment of pleadings, production of documents, examination of witnesses and recording of evidence, grant of adjournments, fixing time for oral arguments, pronouncement of judgment, preparation of decree, etc. A new provision for settlement of disputes outside the court has been introduced.

15. (1999) 2 SCC 325 at p. 326; AIR 1999 SC 882 at p. 883.

16. (2002) 1 SCC 662 at p. 668; AIR 2002 SC 251 at p. 254 (*per* Mohapatra, J); see also *Shub Karan Bubna v. Sita Saran Bubna*, (2009) 9 SCC 689.

## 7. SUGGESTIONS

It is clear, from what has been stated above, that the present Code of Civil Procedure after the Amendments of 1976, 1999 and 2002 is an attempt to provide justice keeping in view, *inter alia*, the basic consideration that justice should not be delayed. The changes made by the Amendment Acts are, however, not sufficient.

The following suggestions are made with a view to reducing delay in civil litigation:

(1) There is one provision, which, if used effectively by courts, can help to cut short the litigation. Order 10 Rule 2 provides that at the first hearing of the suit, the court (a) shall, with a view to elucidating matters in controversy in the suit, examine orally such of the parties to the suit appearing in person or present in court, as it deems fit; and (b) may orally examine any person, able to answer any material question relating to the suit, by whom any party appearing in person or present in court or his pleader is accompanied. Thus, this provision casts a duty on the court to examine the parties orally before settling the issues. In practice, however, this provision is simply ignored and issues are invariably raised from the pleadings of the parties. If the judge examines the parties orally, it is quite likely that many a time the truth will come out immediately in spite of what is stated in the pleadings. This will obviate the need for examining numerous witnesses on either side on a point of disputed fact. In the humble opinion of the author, the use of this provision alone, more than anything else, can cut short litigation substantially.

(2) Even though the Law Commission<sup>17</sup> recommended deletion of a statutory notice under Section 80, it has been retained. It is submitted that because of two reasons such notice is not necessary: *firstly*, the State or Public Officer should not have a privilege in the matter of litigation as against a citizen and should not have a higher status than an ordinary litigant in this aspect. As a matter of fact, such notice is not necessary for taking proceedings under Articles 32 and 226 of the Constitution of India; and *secondly*, as observed by Justice Krishna Iyer<sup>18</sup>, it is intended to alert the Government to negotiate a just settlement or at least have the courtesy to tell the aggrieved person why the claim is being resisted. But it has become an empty formality because the administration is always unresponsive.<sup>19</sup> The provision relating to notice is, therefore, required to be deleted.

(3) Certain provisions, on the other hand, are not properly applied, e.g. Sections 99 and 99-A (no decree or order under Section 47 to be

17 Law Commission's Fifty-fourth Report at pp 10-14

18. *State of Punjab v. Geeta Iron & Brass Works Ltd.* (1978) 1 SCC 68 AIR 1978 SC 1608

19. *Ibid.* at p 69 (5CC) at p 1609 (AIR), see also *supra*, Pt II, Chap 16

reversed or modified for error or irregularity not affecting the merits of the case, etc.) have not been usually pressed into service by courts or even by parties. Similarly, Sections 35-A and 35-B (compensatory costs in respect of false or vexatious claims or defences and for causing delay) are rarely used by courts or even by litigants. Again, though Order 41 Rule 11 expressly authorises an appellate court to dismiss First Appeals summarily by recording reasons, this provision is not known to be used by appellate courts other than High Courts, and all First Appeals are admitted by appellate courts as a matter of course. Further, though Order 41 Rule 3-A prohibits an appellate court to grant stay when the appeal is time-barred, in many cases, appellate courts grant stay/injunction subject to the limitation being condoned. This is clearly contrary to the legislative intent reflected in Rule 3-A. Similarly, in spite of the specific provision in Order 41 Rule 23-A for ordering remand when the case does not fall within the sweep of Rule 23 or Rule 25, generally, it is not resorted to by appellate courts.

(4) Sometimes, the government files an appeal even though there is no substance in it or the point is covered by the judgment of the Supreme Court. Courts are, in these circumstances, constrained to observe against a litigious approach adopted by the Government.

In *State of Maharashtra v. Vinayak Deshpande*<sup>20</sup>, the Supreme Court had to observe:

"It is indeed difficult to understand as to why the State of Maharashtra should have preferred the present appeal at all . . . . We do not think it is right that the State Government should lightly prefer an appeal in this court against the decision given by the High Court unless they are satisfied, on careful consideration and proper scrutiny, that the decision is erroneous and public interest requires that it should be brought before a superior court for being corrected. *The State Governments should not adopt a litigious approach and waste public revenues on fruitless and futile litigation where there are no chances of success.*"<sup>21</sup> (emphasis supplied)

It is undoubtedly true that if the Government were more careful in deciding whether to carry the matter in appeal or not, a number of appeals filed by the Government may substantially diminish.

(5) In many cases the court issues a notice to the Government or public bodies at the admission stage so as to settle the case immediately where the point at issue is such that regular hearing is hardly necessary and the matter could be decided promptly. Unfortunately, however, the Government machinery is very slow to act and, more often than not, there is no response to the notice and the court is constrained to admit the matter which remains pending for a number of years when it could have been disposed of at the initial stage.

20. (1976) 3 SCC 405; AIR 1976 SC 1204.

21. *Ibid*, at p. 407 (SCC); at p. 1206 (AIR).

(6) It is possible to reduce the burden of cases on regular courts by exploring the possibilities of setting up other forums where the disputes between the parties can be settled more informally and speedily, though under some kind of judicial supervision, e.g. separate Family Courts have been set up to deal with matrimonial cases and other disputes relating to family affairs. Members of such courts may be appointed from amongst serving or retired judges. Similarly, if more tribunals are created to deal with disputes arising under various laws, the burden on regular courts will be reduced to that extent. Since these Family Courts and tribunals will be subject to the supervisory jurisdiction of the High Court under Article 227 of the Constitution, it will ensure that they decide the cases coming before them judiciously and in accordance with law and not arbitrarily or capriciously. In this connection, it will be appropriate to mention of the experiment of holding Conciliation Courts and *Lok Adalats* which is being carried on in many States. Such *Adalats* are held at various places from time to time and apart from judges and lawyers, social workers are also invited to attend the proceedings and help the parties in settling their disputes informally. This experiment, it is submitted, is worth making in all States.

It may be stated at this stage by the Code of Civil Procedure (Amendment) Act, 1999, which has come into force from 1 July 2002, a provision has been made (Section 89) for settlement of disputes outside the court through arbitration, conciliation, mediation and *Lok Adalats*.

(7) Last but not the least, all agree that justice must be cheap and expeditious. However, in order to provide cheap and expeditious justice, it is necessary to appoint competent judges. But the present emoluments of judges are so meagre that they do not attract competent people to the Bench. If society wants cheap and expeditious justice, it must also bear the expense of competent judges. The principle that "justice must be cheap but judges expensive" is, though universally recognised, never acted upon.

Before we conclude the discussion, it is worthwhile to quote the following observations of an eminent jurist<sup>22</sup>:

"To my mind, the solution is very simple. See that the men you appoint are the proper ones. Find judges with an alert and active mind. What is more important, pay the judges better, give them a better pension, and enforce better conditions of service. The usual solution put forward is to increase the number of judges. But if the men selected are not really competent Parkinson's Law will come into play. *The more the judges, the greater will be the load of work.*"<sup>23</sup>

(emphasis supplied)

22 Justice M C Chagla

23 M C Chagla, *Roses in December* (1973) at p. 127. see also *Kumar Padma Prasad v Union of India*, (1992) 2 SCC 428 (1992) 20 ATC 217 (2.1a) AIR 1992 SC 1213

Part VI  
Limitation Act



# Limitation Act, 1963

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## 1. PROCEDURAL LAW

Generally, laws are divided in two categories: (i) substantive law, and (ii) procedural law. Substantive law deals with rights and liabilities of subjects, while procedural law lays down procedure for enforcement of those rights and liabilities.<sup>1</sup>

Contract Act, 1872; Partnership Act, 1932; Transfer of Property Act, 1882; Penal Code, 1860; etc. are instances of substantive laws. Evidence Act, 1872; Civil Procedure Code, 1908 (CPC); Criminal Procedure, 1973 (CrPC); etc. are procedural laws. Limitation Act, 1963 is also a procedural law.<sup>2</sup>

But a bold statement that substantive law determines rights while procedural law deals with remedies is not wholly valid. The reason is

1. Glanville Williams, *Learning the Law*, (1982), pp. 19-113, Law Commission's Fifty-fourth Report, p. 18; see also, "Introduction", *Civil Procedure*, at pp 3-4.
2. *Ibid*; see also *A.S.K. Krishnappa Chettiar v. S.V.V. Somiah*, AIR 1964 SC 227

that neither the entire law of remedies belongs to procedure nor the rights are merely confined to substantive law. Rights are sometimes hidden in procedure. There is thus no clear cut division between the two.<sup>3</sup>

## 2. HISTORY OF LIMITATION ACT

Hindu jurisprudence had no law of limitation. The only law referred to by *smriti* writers was a law of prescription which laid down a period of 20 years for acquisition of title, concentration being on land and on immovable property.

Even under the British rule, there was no uniform law of limitation. Three Supreme Courts established under the Royal Charter in three Presidency Towns of Calcutta, Madras and Bombay administered English Law of Limitation, while mofussil courts used to apply different law, Acts and regulations.

It was in the year 1862 that for the first time, the Limitation Act was made applicable to the whole of India which was replaced by the Acts of 1871, 1877 and 1908. In 1963, the present Act has been enacted by implementing various suggestions and recommendations of the Law Commission of India.<sup>4</sup>

## 3. OBJECT

The object and utility of law of limitation has never been a matter of doubt or dispute. A law of limitation is a statute of repose, peace and justice. It is a matter of repose because it extinguishes State demands and quiets title. It seeks to obtain peace and security by raising a presumption that a right not exercised for a long time is non-existent. It is intended to do justice inasmuch as it takes into consideration ground reality that the right of parties should not be in state of constant doubt, dispute or uncertainty.<sup>5</sup>

Statutes on limitation are based on two well-known legal maxims:

- (i) The interest of the State requires that there should be an end to litigation (*Interest reipublicae ut sit finis litium*).
- (ii) The law assists the vigilant and not one who sleeps over his rights (*Vigilantibus non dormientibus jura subveniunt*).<sup>6</sup>

3 *Bharat Barrel & Drum Mfg Co Ltd v ESI Corpn*, (1971) 2 SCC 860 AIR 1972 SC 1935

4 Law Commission's Third Report

5 *Nav Rattanmal v State of Rajasthan*, AIR 1961 SC 1704 (1962) 2 SCR 324. *Shanti Kumar R Canji v Home Insurance Co of New York*, (1974) 2 SCC 387 AIR 1974 SC 1719. *Truok Chand Saini v State of Rajasthan*, (2003) 3 Raj LR 429

6 *Ibid*, see also *Bharat Barrel & Drum Mfg Co Ltd v ESI Corpn*, (1971) 2 SCC 860 AIR 1972 SC 1935

There are three cogent grounds in support of the law of limitation:

- (i) long dormant claims have more of cruelty than justice in them;
- (ii) a defendant might have lost evidence to disprove a stale claim; and
- (iii) a person with good cause of action should pursue it with reasonable diligence.<sup>7</sup>

#### 4. INTERPRETATION

The law of limitation is procedural or adjective law. The function of adjective law is to facilitate justice and further its ends. The rules of procedure are intended to be a handmaid to the administration of justice. They must, therefore, be construed in such a manner as to render enforcement of substantive rights effective.<sup>8</sup>

A statute of limitation deprives an aggrieved person to have recourse to legal remedy. Hence, wherever its language is vague, unclear or ambiguous, that construction should be preferred which preserves such remedy to one which bars or defeats it.<sup>9</sup>

Equitable considerations, however, are irrelevant and immaterial in interpreting and applying the law of limitation.<sup>10</sup>

#### 5. SCHEME OF LIMITATION ACT, 1963

The present Limitation Act of 1963 is enacted on the basis of suggestions and recommendations of the Law Commission. According to the Law Commission, the law of limitation should be simple, certain and rational. The period of limitation should neither be too long nor too short. It should be in consonance with the outlook and notions of laymen. For instance, period of limitation for recovery of immovable property should be 12 years while for other cases, it should be three years, etc.<sup>11</sup>

7. *Halsbury's Laws of England* (4th Edn.), Vol. 28, para. 605 at p. 266.

8. *Sangram Singh v. Election Tribunal*, AIR 1955 SC 425; (1955) 2 SCR 1; *Bhawampore Banking Corpn. Ltd. v. Gauri Shankar Sharma*, AIR 1950 SC 6; 1950 SCR 25; *Jai Jai Ram Manohar Lal v. National Building Material Supply*, (1969) 1 SCC 869; AIR 1969 SC 1267; *Pram Lala Nahata v. Chandi Prasad Sikaria*, (2007) 2 SCC 551; AIR 2007 SC 1247, see also, "Civil Procedure", *supra* at pp 8-9.

9. *A S.K. Krishnappa Chettiar v. S.V.V. Somiah*, AIR 1964 SC 227; (1964) 2 SCR 241; *Lala Balmukund v. Lajwanti*, (1975) 1 SCC 725; AIR 1975 SC 1089; *Roshan Lal Kuthalia v. R.B. Mohan Singh Oberoi*, (1975) 4 SCC 628; AIR 1975 SC 824.

10. *Siraj-ul-Haq Khan v. Sunni Central Board of Wakf*, AIR 1959 SC 198; 1959 SCR 1287; *Boota Mal v. Union of India*, AIR 1962 SC 1716; (1963) 1 SC 75; *Nath Basheshwar Das v. Tek Chand*, (1972) 1 SCC 893; AIR 1972 SC 1548; *P.D. Jambekar v. State of Gujarat*, (1973) 3 SCC 524; AIR 1973 SC 309.

11. Law Commission's Third Report at p. 1.

The substantive part of the Act contains sections (Ss. 1-32). The schedule prescribes period of limitation. The first division relates to suits of various types mentioned therein and prescribes period of limitation for filing such suits, providing time from which such period begins to run. The second division applies to appeals, whereas the third division deals with applications of different types.<sup>12</sup>

The sections in the body of the Act govern and control articles in the schedule. All the provisions of the Act should be read together harmoniously but in case of conflict or inconsistency, the former will prevail over the latter.<sup>13</sup>

## 6. LIMITATION ACT, 1963: WHETHER EXHAUSTIVE

The Limitation Act, 1963 has been enacted "to consolidate and amend" the law for the limitation of suits and other proceedings. The Act is thus a complete Code and is exhaustive in respect of all matters specifically and expressly dealt with by it. No court, hence, can travel beyond the provisions of the Act.<sup>14</sup>

But in respect of matters not dealt with by it, the Act has no application. The provisions of the Act cannot be extended by analogy or reference to proceedings to which they do not apply, either expressly or by necessary implication.<sup>15</sup>

Thus, a proceeding which does not fall under any of the articles in the First Schedule cannot be held to be barred by time on the analogy of a matter which is governed by a particular article.<sup>16</sup>

## 7. RETROSPECTIVE OPERATION

It is well-settled that as a general rule, substantive statutes are prospective while procedural laws are retrospective. This is based on the principle that no one has a vested right in procedure.<sup>17</sup>

12. *Bhawaniapore Banking Corpn Ltd v Gauri Shankar Sharma*, AIR 1950 SC 6, *Ramprasad Degaduram v. Vijaykumar Motilal Hirakhanwala*, AIR 1967 SC 278, 1966 Supp SCR 188, *Syed Yousuf Yar Khan v. Syed Mohammed Yar Khan*, AIR 1967 SC 1318, *Nar Rattanmal v State of Rajasthan*, AIR 1961 SC 1704.

13. *Director of Inspection of Income Tax (Investigation) v. Pooran Mal & Sons*, (1975) 4 SCC 568 AIR 1975 SC 67, *State of U P v Babu Ram Upadhyay*, AIR 1961 SC 751 (1961) 2 SCR 679, see also, *Civil Procedure* p. 10.

14. *A S K Krishnappa Chettiar v S V V Samiah*, AIR 1964 SC 227, *Manohar Lal Chopra v Seth Hiralal*, AIR 1962 SC 527 1962 Supp (1) SCR 450, *Padam Sen v State of U P*, AIR 1961 SC 218 (1961) 1 SCR 884.

15. *Ibid*, see also *Hukam Chand Boid v Kamalanand Singh* ILR (1906) 33 Cal 927.

16. *Ibid*, see also *Bhawaniapore Banking Corpn Ltd v Gauri Shankar Sharma*, AIR 1950 SC 6 1950 SCR 25, *Kalpada Chakraborti v Palani Bala Devi*, AIR 1953 SC 125 1953 SCR 503.

17. *Halsbury's Laws of England* (4th Edn), Vol. 44 at p. 574, *Gorachan Singh v Satpal Singh*, (1990) 1 SCC 445 AIR 1990 SC 209, see also, "Civil Procedure" at p. 10.

But it is equally well-settled that no statute can take away vested right, nor it can create new obligation. It can no doubt change the forum.<sup>18</sup>

It has been authoritatively held that though the law of limitation is a procedural law, it can neither provide a longer period by reviving a dead remedy nor can it extinguish vested right of action by providing a shorter period. In other words, the law of limitation which is in vogue on the commencement of action would govern it.<sup>19</sup>

The provisions of the Limitation Act, 1963 apply to proceedings already commenced at the time when the Act came into force.<sup>20</sup>

## 8. LIMITATION BARS REMEDY

The law of limitation, being a procedural law, merely bars the *remedy*. It does not destroy primary or substantive *right* accrued in favour of a party. The judicial remedy available for enforcement of such right is barred, but the substantive right survives and continues to be available if there are other ways or means for enforcing it.<sup>21</sup>

Hence, if a debtor pays to his creditor time-barred debt, he cannot claim it back on the ground that the creditor could not have filed a suit against the debtor for recovery of the said amount. Similarly, if a debtor owes several debts to a creditor, some of which are barred by limitation, and makes payment of some amount without any specification and the creditor adjusts the amount towards time-barred debt, the debtor cannot object nor he can claim such amount. A creditor may obtain payment of time-barred debt by a permissible mode, e.g. a right of lien, valid contract, etc.<sup>22</sup>

## 9. LIMITATION DOES NOT BAR DEFENCE

The law of limitation bars an action and not a defence. It is, therefore, open to the defendant in a suit filed by the plaintiff to set up a plea in defence which he may not be able to enforce by filing a suit.<sup>23</sup>

18. *Ibid*, see also, S. 6, General Clauses Act, 1879; S. 31, Limitation Act, 1963.

19. *Ibid*; see also *New India Insurance Co. Ltd. v. Shanti Misra*, (1975) 2 SCC 840; AIR 1976 SC 237, *Beepathuma v. Velasari Shankaranarayana Kadambolithaya*, AIR 1965 SC 241; (1964) 5 SCR 836.

20. *Ibid*, see also *Ramprasad Degaduram v. Vijaykumar Motilal Hirakhanwala*, AIR 1967 SC 278; *Mahadeo Prasad Singh v. Ram Lochan*, (1980) 4 SCC 354; AIR 1981 SC 416.

21. *Bharat Barrel & Drum Mfg. Co. Ltd. v. ESI Corpn.*, (1971) 2 SCC 860; AIR 1972 SC 1935; *New Delhi Municipal Committee v. Kalu Ram*, (1976) 3 SCC 407. AIR 1976 SC 1637, *Lala Balmukund v. Lajwanti*, (1975) 1 SCC 725; AIR 1975 SC 1089.

22. *Ibid*, see also *Ittyavira Mathai v. Varkey Varkey*, AIR 1964 SC 907; (1964) 1 SCR 495; *S C Prashar v. Vasantsen Dwarkadas*, AIR 1963 SC 1356; (1964) 1 SCR 29. See also, S. 25(3), Contract Act, 1872.

23. *Kishan Lal v. Kashmiro*, AIR 1916 PC 172; *Ali Mohd v. Ramniwas*, AIR 1967 Raj 258, *Hari Rajsingh v. Sanchalak Panchayat Raj, U P*, AIR 1968 All 246.

Thus, in a voidable transaction, the defendant may raise any plea for enforcing the transaction, though he could not have filed suit for its enforcement on such plea. Similarly, in a suit to set aside a decree obtained by fraud, the fraudulent character of decree can be set up as a defence by the defendant, even after expiry of the period of limitation for filing a suit. Again, wrong description of property in the sale-deed does not debar the defendant purchaser from setting up a defence and from protecting his possession by showing that the property sold to him was the real property sold, but it was wrongly described in the sale-deed. Again, an attorney can avail right of lien for his fees, although a suit might have been time-barred.<sup>24</sup>

But if the expiry of limitation destroys the right itself, it can neither be enforced by a suit nor can be set up as a defence.<sup>25</sup> Thus, the defendant cannot raise a plea in defence of some inchoate or imperfect right, establishment of which depends upon a suit within a particular period and the said period has expired within which no suit is filed.

## 10. CRIMINAL PROCEEDINGS

As a general rule, "crime never dies". Lapse of time, hence, does not bar the right of the Crown to prosecute an offender.<sup>26</sup> The provisions of the Limitation Act, 1963 do not apply to criminal proceedings, except where express provisions have been made for that purpose.<sup>27</sup> Thus, there is no limitation for lodging a complaint of a criminal case, unless the Code of Criminal Procedure, 1973 or the penal law creating the offence itself prescribes the period within which a complaint is required to be filed.<sup>28</sup>

## 11. PROCEEDINGS UNDER THE CONSTITUTION OF INDIA

A writ petition under Article 32 or Article 226 of the Constitution is neither a suit, nor an appeal, nor an application within the meaning of the Limitation Act, 1963. The provisions of the Limitation Act, 1963, therefore, do not apply to writ petitions filed in the Supreme Court (Art. 32) or in High Courts (Art. 226).<sup>29</sup>

24. *Ibid.*, see also, *Krishna Aiyar v Subba Reddiar*, AIR 1939 Mad 678 (1939) 1 MLJ 770, *Manadev Narayan Datar v Sadashiv Keshev Limaye*, AIR 1921 Bom 257.

25. *Ibid.*, see also, S. 27, Limitation Act, 1963, see also, "Extinguishment of right" at p. 793.

26. For detailed discussion, see *Authors' Criminal Procedure* (2011) at pp. 403-13.

27. Arts. 114, 115, 131, 132, Limitation Act, 1963.

28. Chap. XXXVI (Ss. 466-73), Code of Criminal Procedure, 1973, see *Authors' Criminal Procedure* (2011) at pp. 403-13.

29. For detailed discussion, see *Authors' Lectures on Administrative Law* (2012) at pp. 356-58, *Administrative Law* (2012) at pp. 952-58, V.G. Ramachandran, *Law of*

Article 133 of the Limitation Act, 1963, however, prescribes period of limitation of 90 days for filing a special leave to appeal to the Supreme Court.<sup>30</sup>

## 12. LIMITATION ACT APPLIES TO COURTS

The Limitation Act, 1963 applies to courts only. It applies to proceedings which can be initiated in a court of law. Tribunals, quasi-judicial bodies and adjudicating authorities, other than courts, are not within the contemplation of the Limitation Act.<sup>31</sup> The provisions of the Limitation Act, 1963, hence, do not apply to proceedings before the labour court,<sup>32</sup> or Arbitration Tribunal,<sup>33</sup> or Election Tribunal.<sup>34</sup>

## 13. PLEA OF LIMITATION: DUTY OF COURT

Section 3 of the Limitation Act enacts that "every suit instituted, appeal preferred and application made after the prescribed period *shall be dismissed*, although limitation has not been set up as a defence."

Section 3 is thus peremptory or mandatory in nature and casts duty on the court to dismiss the suit, appeal or application, if it is beyond the period of limitation. It is immaterial whether such a plea has been set up in defence by the opposite party.<sup>35</sup>

It has, therefore, been held that a new plea of limitation can be taken at any stage of the proceedings, provided it is based on admitted, undisputed or proved facts and does not involve investigation of facts.<sup>36</sup>

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*Writs* (2006) at pp. 174-204.

30. *Ibid*, at pp. 406, 1032; and pp. 1488-96.

31. *Sushila Devi v. Ramanandan Prasad*, (1976) 1 SCC 361. AIR 1976 SC 177, *Nityananda v. LIC of India*, (1969) 2 SCC 199. AIR 1970 SC 209, *K V Rao v. B N. Reddi*, AIR 1969 SC 872; (1969) 1 SCR 679; *Town Municipal Council v. Labour Court*, (1969) 1 SCC 873. AIR 1969 SC 1335.

32. *Nityananda v. LIC of India*, (1969) 2 SCC 199; AIR 1970 SC 209, *Town Municipal Council v. Labour Court*, (1969) 1 SCC 873; AIR 1969 SC 1335

33. *Assam Urban Water Supply & Sewerage Board v. Subhash Project & Marketing Ltd*, (2005) 30 AIC 891.

34. *K V. Rao v. B.N. Reddi*, AIR 1969 SC 872; (1969) 1 SCR 679; *Mohan Raj v. Surendra Kumar*, AIR 1969 SC 677; (1969) 1 SCR 630; *D P. Mishra v. Kamal Narayan Sharma*, (1970) 2 SCC 369; AIR 1970 SC 1477.

35. *Noharlal Verma v. District Coop. Central Bank Ltd*, AIR 2009 SC 664; *Manindra Land & Building Corpn. v. Bhutnath Banerjee*, AIR 1964 SC 1336. (1964) 3 SCR 495, *Rajender Singh v. Santa Singh*, (1973) 2 SCC 705; AIR 1973 SC 2537; *Ittyavira Mathai v. Varkey Varkey*, AIR 1964 SC 907; (1964) 1 SCR 495; *Rama Shankar Singh v. Shyamlati Devi*, AIR 1970 SC 716; (1969) 2 SCR 360.

36. *Ibid*, see also, *Banarsi Das v. Kanshi Ram*, AIR 1963 SC 1165; (1964) 1 SCR 316; *Municipal Corpn. v. Niyamatullah*, (1969) 2 SCC 551; AIR 1971 SC 97; *Pandurang Dhondi Chougule v. Maruti Hari Jadhav*, AIR 1966 SC 153; (1966) 1 SCR 102.

## 14. STARTING POINT OF LIMITATION

Limitation starts running from the date right to sue accrues in favour of a party. "Right to sue" means right to seek relief, i.e. right to approach a court of law. Thus, there can be no "right to sue" until there is an accrual of right asserted in the suit, appeal or other proceedings.<sup>37</sup>

In such cases, second column of each article fixes the period of limitation, while the third column specifies time from which the period of limitation starts running.<sup>38</sup>

## 15. EXPIRY OF PERIOD OF LIMITATION WHEN COURT IS CLOSED

Section 4 of the Limitation Act, 1963 states that where the prescribed period for any suit, appeal or application expires on a day when the court is closed, the suit, appeal or application may be filed on the day the court reopens.<sup>39</sup>

Section 4 is based on two well-known principles:<sup>40</sup>

- (i) The law does not compel a person to do that which he cannot possibly perform (*lex non cogit ad impossibilia*).
- (ii) An act of court shall prejudice no one (*actus curiae neminem gravabit*).

## 16. EXTENSION OF PERIOD OF LIMITATION

Section 5 of the Limitation Act provides for extension of time in certain cases. It states that any appeal or application may be admitted even after the limitation is over, if the appellant or applicant satisfies the court that he had "sufficient cause" for not filing such appeal or application within the period of limitation.<sup>41</sup>

In such cases, delay in filing an appeal or application can be condoned by a court and the matter can be heard and decided on merits.

37. *Phool Rani v Naubat Rai Ahluwalia*, (1973) 1 SCC 688 AIR 1973 SC 2110. *Gannon Dunkerley & Co. Ltd. v Union of India*, (1969) 3 SCC 607 AIR 1970 SC 1433. *Rukhmabai v Lala Laxminarayan*, AIR 1960 SC 335 (1960) 2 SCR 235.

38. *Ibid*.

39. S. 10, General Clauses Act, 1897 also lays down this principle.

40. *Amar Chand Inani v Union of India* (1973) 1 SCC 215 AIR 1973 SC 313. *Hukumdev Narain Yadav v Lalit Narain Mishra* (1974) 2 SCC 133 AIR 1974 SC 480. *D P Mishra v Kamal Narayan Sharma*, (1970) 2 SCC 369 AIR 1970 SC 1477.

41. For detailed discussion, see, "Sufficient cause" at p. 789.

## 17. CONDONATION OF DELAY

The general rule laid down in Section 3 of the Limitation Act, 1963 declares that every suit, appeal or application filed after the period of limitation *shall* be dismissed.<sup>42</sup>

So far as suit is concerned, the rule is absolute and unqualified. Any suit instituted after the prescribed period of limitation has to be dismissed inasmuch as there is no provisions for condonation of delay in filing a suit.<sup>43</sup>

In respect of appeals and applications, however, the Limitation Act, 1963 provides for extension of time and condonation of delay in filing appeals and applications (S. 5). It provides that where the appellant or applicant satisfies the court that he had a "sufficient cause" for not preferring appeal or making application, the court may condone delay and hear the case on merits.<sup>44</sup>

While dealing with an application for condonation of delay, the court will keep in view two conflicting considerations:

- (i) As far as possible, the court would try to decide every cause on merits rather than throwing it away on technical ground of delay without entering into real issues in the case.
- (ii) The court must also consider an important aspect that non-filing of appeal or application has created a valuable right in favour of the opposite party which cannot be defeated or interfered with lightly.<sup>45</sup>

## 18. "SUFFICIENT CAUSE"

Section 5 of the Limitation Act, 1963 enables the court to condone delay in filing appeal or application, if the appellant or applicant satisfies the court that he had "sufficient cause" for not preferring an appeal or making an application within such period.

But what is "sufficient cause"? The expression "sufficient cause" has not been defined in the Act. It is, however, very wide, comprehensive and elastic in nature. It is also construed liberally by courts so as to advance the cause of justice.<sup>46</sup>

42. S. 3, Limitation Act, 1963; *see also*, "Plea of limitation: Duty of court" at p. 787.

43. *Sk. Mohammad Ismail v. Sk. Anwar Ali*, AIR 1991 Cal 391; *Sanghmitra v. Director of Higher Education*, (2003) 1 RCR 175 (Ori); *Rikhabdas v. Chandro*, AIR 1971 All 234, *Pindukuru Balarami Reddy v. Jaladanki Venkatasubbaiah*, AIR 1965 AP 386.

44. For detailed discussion, *see*, "Sufficient cause" at p. 789.

45. *Ram Nath Sao v. Gobardhan Sao*, (2002) 3 SCC 195; AIR 2002 SC 1201; *see also*, "Sufficient cause" at p. 789.

46. *State of W.B. v. Howrah Municipality*, (1972) 1 SCC 366; AIR 1972 SC 749, *Collector (LA) v. Katiji*, (1987) 2 SCC 107; AIR 1987 SC 1353; *State of Bihar v. Kameshwar Prasad*

Normally, a party who approaches a court of law with a grievance should not be deprived of hearing on merits, unless there is something to show that there was total inaction, gross negligence or want of bona fides on his part. Interpreting the words "sufficient cause" in pragmatic manner and by adopting common sense approach, the court should try to do substantial justice between the parties.<sup>47</sup>

The question whether there was "sufficient cause" in not preferring an appeal or application depends upon the facts and circumstances of each cause, and no rule of universal application can be laid down.<sup>48</sup>

In *Collector (LA) v. Katiji*<sup>49</sup>, the Supreme Court laid down the following principles, while dealing with an appeal or application not preferred within the period of limitation:

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this, when delay is condoned, the highest that can happen is that a cause would be decided on merits after hearing the parties.
3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational, common-sense pragmatic manner.
4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred, for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk.
6. It must be grasped that judiciary is respected not on account of its power to legalise injustice on technical grounds, but because it is capable of removing injustice and is expected to do so.<sup>50</sup>

*Singh*, (2000) 9 SCC 94. AIR 2000 SC 2306, *Plasto Pack v. Ratnakar Bank Ltd* (2001) 6 SCC 683. AIR 2001 SC 3651, *Ram Nath Sao v. Gobardhan Sao*, (2002) 3 SCC 195.

47. *Ibid*, see also *G P Srivastava v. R K. Raizada*, (2000) 3 SCC 54. AIR 2000 SC 1221, *Sudha Devi v. M P Narayanan*, (1988) 3 SCC 366. AIR 1988 SC 1381.

48. *Ibid*, see also *UCO Bank v. Iyengar Consultancy Services (P) Ltd.*, 1994 Supp (2) SCC 399, *Payal Ashok Kumar Jindal v. Capt. Ashok Kumar Jindal*, (1992) 3 SCC 136. *Salil Dutta v. TM & MC (P) Ltd.*, (1993) 2 SCC 185, *Vijaykumar Durgaprasad Gajbi v. Kamalabat*, (1995) 6 SCC 148.

49. (1987) 2 SCC 107. AIR 1987 SC 1353.

50. *Ibid*, at p. 108 (SCC). For detailed discussion and illustrative cases, see, *Civil Procedure*, "Appearance and non-appearance of parties", *supra*.

## 19. DELAY BY GOVERNMENT

Article 14 of the Constitution of India guarantees equality before the law and equal protection of law. The doctrine of equality, hence, has to be applied by courts to all litigants equally and uniformly. Governmental agencies cannot claim special privilege and must be treated on par with private parties.<sup>51</sup>

But realities of life also should be kept in view by courts. Certain amount of latitude, therefore, is not impermissible. If appeals or applications brought by State are dismissed only on the ground of delay without entering into merits, ultimate sufferer would be public at large. The expression "sufficient cause" should, therefore, be considered keeping in view rational, pragmatic and justice-oriented approach.<sup>52</sup>

It has, however, also been held that State and public authorities should not resist or contest just and honest claims of citizens on technical pleas like law of limitation, notice, etc.<sup>53</sup>

## 20. LEGAL DISABILITY

Section 3 of the Limitation Act lays down general rule of limitation and declares that every suit, appeal or application filed after the period of limitation *shall* be dismissed.<sup>54</sup>

This general rule, however, is subject to certain exceptions. Special circumstances enumerated in Sections 4-24 enable proceedings to be instituted after the lapse of period of limitation.

Sections 6 and 7 provide that where a person or one of several persons is under a legal disability (minor, insane or idiot), he may file a suit or an application within the same period after the disability (minority, insanity or idiocy) has ceased.

Such disability must exist at the time from which the period of limitation is to be reckoned. But once the time has begun to run, subsequent disability will not stop it (S. 9).

51. *Union of India v. Ram Charan*, AIR 1964 SC 215 (1964) 3 SCR 467, *State of Rajasthan v. Jaimal*, 1991 Supp (2) SCC 286; *State of Haryana v. Chandra Mani*, (1996) 3 SCC 132; AIR 1996 1623; *Ahmedabad Muni Corpn. v. Manish Enterprises*, (1992) 2 Guj LR 1252; (1992) 2 GH 176; *Ram Nath Sao v. Gobardhan Sao*, (2002) 3 SCC 195; AIR 2002 SC 1201.
52. *Ibid*; see also, *State of U P v. Harish Chandra*, (1996) 9 SCC 309; AIR 1996 SC 2173; *Apangshu Mohan Lodh v. State of Tripura*, (2004) 1 SCC 119.
53. *Trustees of Port of Bombay v. Premier Automobiles Ltd.*, (1974) 4 SCC 710; AIR 1974 SC 923; *Madras Port Trust v. Hymanshu International*, (1979) 4 SCC 176. AIR 1979 SC 1144, *S.K. Verma v. Mahesh Chandra*, (1983) 4 SCC 214 AIR 1984 SC 1462; *National Insurance Co. Ltd. v. Jugal Kishore*, (1988) 1 SCC 626 AIR 1988 SC 719.
54. See, "Plea of limitation: Duty of court" at p. 787

## 21. COMPUTATION OF PERIOD OF LIMITATION

Part III (Ss. 12-24) provides for computation of period of limitation. They either exclude time of reckoning the period of limitation,<sup>55</sup> or postpone starting point of limitation.<sup>56</sup>

## 22. EXCLUSION OF TIME

Sections 12-15 of the Limitation Act provide for exclusion of time in computing the period of limitation prescribed by law.

Those provisions, *inter alia*, exclude the following periods:

- (i) The day on which the period of limitation is to be reckoned.<sup>57</sup>
- (ii) The day on which the judgment/order/award is pronounced.<sup>58</sup>
- (iii) The time spent in obtaining copy of decree/order/award/sentence.<sup>59</sup>
- (iv) The time spent in prosecuting an application to sue as an indigent person.<sup>60</sup>
- (v) The time spent in proceedings taken bona fide (in good faith) in court having no jurisdiction.<sup>61</sup>
- (vi) The time during which stay or injunction operated.<sup>62</sup>
- (vii) The time spent in giving notice or for obtaining consent or sanction required by law.<sup>63</sup>
- (viii) The time during which there was receiver or liquidator.<sup>64</sup>
- (ix) The time during which proceedings to set aside sale were pending (in a suit for possession).<sup>65</sup>
- (x) The time during which the defendant had been out of India.<sup>66</sup>

## 23. POSTPONEMENT OF LIMITATION

Sections 16-23 of the Limitation Act, 1963 provide for postponement of limitation.

For application of law of limitation, there must be a completed cause of action. In other words, there must be a person who can sue, a person who can be sued, and a cause of action on which a suit, appeal or application can be filed. Moreover, such person should be in a position to institute such proceeding without any hindrance, obstruction or impediment.

55. For detailed discussion, see, "Exclusion of time" at p 792.

56. For detailed discussion, see, "Postponement of limitation" at p 792.

57. S 12 (1)

58. S 12 (2).

59. S. 12 (3) (4)

60. S 13

61. S 14

62. S 15 (1).

63. S 15 (2)

64. S 15 (3)

65. S 15 (4)

66. S 15 (5)

In the following cases, there is postponement of limitation, i.e. the period of limitation will not start running:

- (i) The period of limitation will not start running till there is a person who can sue or who can be sued.<sup>67</sup>
- (ii) In case of fraud or mistake, the period of limitation will not start running till such fraud or mistake is discovered.<sup>68</sup>
- (iii) In case of right or liability, a fresh period of limitation will start running from the date of acknowledgment in writing of such right or liability by the party.<sup>69</sup>
- (iv) In case of debt, payment will provide fresh period of limitation from the time of such payment.<sup>70</sup>
- (v) Where after the institution of a suit, a new plaintiff or defendant is added or substituted, the suit shall be deemed to be instituted against him when he was made a party.<sup>71</sup>

But if the court is satisfied that such omission was due to bona fide mistake, the suit shall be deemed to have been instituted on any earlier date.<sup>72</sup>

- (vi) In case of continuing breach of contract or tort, fresh period of limitation begins to run every moment till breach or tort continues.<sup>73</sup>
- (vii) In a suit for compensation for an act not actionable without special damage, the period of limitation will be computed from the time the injury result.<sup>74</sup>

## 24. EXTINGUISHMENT OF RIGHT

Section 27 of the Limitation Act speaks of extinguishment of right to property.

We have seen that the general principle of law is that limitation bars *remedy* and does not destroy the *right*. The right remains subsisting though without remedy.<sup>75</sup>

Section 27 is an exception to this rule and enacts that the bar of remedy will also extinguish and destroy the right itself. Where a person does not file a suit for possession, his right to such property stands extinguished.<sup>76</sup>

67. S. 16 (1).

68. S. 17.

69. S. 18.

70. Ss. 19, 20.

71. S. 21.

72. Proviso to S. 21.

73. S. 22.

74. S. 23.

75. For detailed discussion, see, "Limitation Bars Remedy" at p. 785.

76. *Dindyal v. Rajaram*, (1970) 1 SCC 786; AIR 1970 SC 1019; *Yeshwantrao Laxmanrao Ghatge v. Baburao Bala Yadav*, (1978) 1 SCC 669; AIR 1978 SC 941; *Krishnamurthy S. Setlur v. O.V. Narasimha Setty*, (2007) 3 SCC 569; AIR 2007 SC 1788.

## 25. VOID ORDER: LIMITATION

At one time, it was held that if an action taken or order made by the authority is illegal, *ultra vires* or void, the law of limitation does not apply to it, and a suit for declaration or for setting aside such order can be filed at any time.<sup>77</sup>

In *Union Carbide Corpn. v. Union of India*<sup>78</sup>, however, the Supreme Court held that even if the act is void or *ultra vires*, the aggrieved party must approach the court within the period of limitation. Since no period is prescribed specifically for such acts, the residuary provision (Art. 113) will apply, and a suit must be filed within three years from the time when the right to sue accrues, i.e. from the date such order is passed or action is taken.

77 *State of Punjab v Ajit Singh* (1988) 1 SLR 96 (P&H), *State of Punjab v Ram Singh* (1986) 3 SLR 379 (P&H), *State of M P v Sued Qamarali*, (1967) 1 SLR 228, *Surajmal Banshidhar v Municipal Board*, (1979) 1 SCC 303 AIR 1979 SC 246

78 (1991) 4 SCC 584 AIR 1992 SC 317

# Appendices

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## APPENDIX A

### Plaint

*In the City Civil Court, at Ahmedabad  
Civil Suit No. 100 of 2002*

Rajnikant Ramprasad Pandya, Hindu, Adult . . . Plaintiff;  
aged about 50 years, residing at 15, Paradise Park,  
Usmanpura, Ahmedabad

*Versus*

Ramanbhai Mohanbhai Patel, Hindu, Adult, aged . . . Defendant.  
about 55 years, residing at 35, Patidar Society, Paldi,  
Ahmedabad

The plaintiff abovenamed humbly states as under:

1. That by an agreement in writing, dated 1 January 2001, signed by the defendant, the defendant contracted to sell to the plaintiff his bungalow referred to in the said agreement (hereinafter referred to as "the suit property") for Rs 10,00,000. An amount of Rs 1,00,000 was paid by the plaintiff to the defendant as earnest money at the time of agreement.

2. The plaintiff was ready and willing to perform his part of the contract and on 1 June 2001, he tendered Rs 9,00,000 the balance of consideration to the defendant and called upon him to execute a sale deed, but the defendant refused to do so.

3. The plaintiff has always been and is still ready and willing to perform his part of the contract by paying the balance of purchase price to the defendant.

4. The cause of action for the suit arose on 1 January 2001 when the defendant executed the agreement to sell the suit property to the plaintiff; and on 1 June 2001, when the plaintiff tendered the balance amount to the defendant and showed his readiness and willingness to perform his part of the contract but the defendant refused to execute the sale deed and thereby failed to perform his part of the contract.

5. The cause of action arose in Ahmedabad because the agreement was made in Ahmedabad, the suit property is situate in Ahmedabad and the defendant also resides in Ahmedabad within the jurisdiction of this Court and this Court has, therefore, jurisdiction to try this suit.

6. The value of the subject-matter of the suit for the purpose of jurisdiction as well as court fees is Rs 10,00,000.

7. The plaintiff, therefore, prays:

- (a) that the defendant may be ordered to transfer the suit property by executing a sale deed in favour of the plaintiff;
- (b) that in the alternative, the defendant may be ordered to refund to the plaintiff the amount of Rs 1,00,000 paid as earnest money and also to pay Rs 9,00,000 as damages for committing breach of the contract;
- (c) that the defendant may be ordered to pay the plaintiff's costs of this suit;
- (d) that such further or other relief as the nature of the case may require may also be granted.<sup>1</sup>

8. The description of the suit property is given in the schedule annexed to this plaint.

ABC

*Plaintiff's Advocate*

.....

*Plaintiff*

#### *Verification*

I, *Rajnikant Ramprasad Pandya*, the plaintiff abovenamed do solemnly declare that what is stated in paras 1 to 4 is true to my knowledge and that what is stated in the remaining paras is stated on the information received by me and I believe it to be true.

.....

*Plaintiff*

#### **SCHEDULE**

##### *Description of the Suit Property*

Bungalow No. 37, known as "Patel Villa", situate in Patidar Society, Paldi, Ahmedabad. The boundaries of the suit property are as under:

- To the east—Bungalow No. 38;
- To the west—Bungalow No. 36;
- To the north—Open plot; and
- To the south—Public road.

1 Strictly speaking, this prayer is not necessary (*see supra*, Pt. II, Chap. 7).

## APPENDIX B

### Written Statement

*In the City Civil Court, at Ahmedabad*  
*Civil Suit No. 100 of 2002*

Rajnikant Ramprasad Pandya, Hindu, Adult . . Plaintiff;  
aged about 50 years, residing at 15, Paradise Park,  
Usmanpura, Ahmedabad

*Versus*

Ramanbhai Mohanbhai Patel, Hindu, Adult, aged . . Defendant.  
about 55 years, residing at 35, Patidar Society,  
Paldi, Ahmedabad

The written statement on behalf of the defendant abovenamed:

1. The defendant denies that he entered into an agreement to sell the suit property to the plaintiff on 1 January 2001 or on any other date and that the plaintiff paid Rs 1,00,000 or any other amount to him as earnest money as alleged in para 1 of the plaint.

2. The defendant denies that on 1 June 2001 or on any other date, the plaintiff tendered Rs 9,00,000 or any other amount to him and called upon him to execute the sale deed as alleged in para 2 of the plaint. The defendant says that since it is not true that he executed any agreement to sell the suit property to the plaintiff, the question of the plaintiff tendering the balance of consideration and the plaintiff being ready and willing to perform his part of the alleged contract did not arise at all and the whole story is got up and false.

3. The defendant says that in view of what is stated above, the plaintiff has no cause of action to file the suit against him.

4. The defendant, therefore, submits that the plaintiff is not entitled to any of the reliefs claimed by him in the plaint and the suit filed by him be dismissed with costs.

DEF

.....

*Defendant's Advocate**Defendant**Verification*

I, *Ramanbhai Mohanbhai Patel*, the defendant abovenamed do solemnly declare that what is stated in paras 1 and 2 is true to my knowledge and that what is stated in the remaining paras is stated on information received by me and I believe it to be true.

.....

*Defendant*

## APPENDIX C

### Issues

*In the City Civil Court, at Ahmedabad  
Civil Suit No. 100 of 2002*

Rajnikant Ramprasad Pandya, 15, Paradise Park, . . Plaintiff;  
Usmanpura, Ahmedabad

*Versus*

Ramanbhai Mohanbhai Patel, 35, Patidar Society, . . Defendant.  
Paldi, Ahmedabad

*Issues*

The following issues were framed at Ex. 15:

1. Whether the plaintiff proves that the defendant entered into an agreement to sell suit property to him for Rs 10,00,000?
2. Whether the plaintiff proves that he paid a sum of Rs 1,00,000 as earnest money to the defendant?
3. Whether the plaintiff proves that he was and is ready and willing to perform his part of the contract?
4. Whether the defendant proves that the case of the plaintiff is totally false and got up?
5. To what relief, if any, the plaintiff is entitled to?
6. What order and decree?

My findings are as under:

1. In the affirmative.
2. In the affirmative.
3. In the affirmative.
4. In the negative.
5. As per final order.
6. As per final order.

## APPENDIX D

### First Appeal

*In the City Civil Court, at Ahmedabad*  
*Civil Suit No. 57 of 2003*

Ramanbhai Mohanbhai Patel, 35, Patidar .. Appellant  
Society, Paldi, Ahmedabad (Ori. Defendant);

*Versus*

Rajnikant Ramprasad Pandya, 15, Paradise .. Respondent  
Park, Usmanpura, Ahmedabad (Ori. Plaintiff).

Appeal under Section 96 of the Code of Civil Procedure, 1908

Claim: Rs 10,00,000

The appellant abovenamed most respectfully states as under:

1. That the plaintiff-respondent filed a suit in the City Civil Court at Ahmedabad being Civil Suit No. 100 of 1992 against the defendant-appellant for specific performance of the contract alleged to have entered into by him with the defendant. In the alternative, the plaintiff prayed for damages of Rs 10,00,000 from the defendant alleging that the defendant had committed breach of contract.

2. That the learned Judge, by his judgment dated 13 January 2003, decreed the suit filed by the plaintiff for specific performance of the contract and ordered the defendant to execute a sale deed in favour of the plaintiff.

3. That being aggrieved by the decree passed by the learned Judge, the appellant herein begs to prefer this appeal on the following among other grounds:

*Grounds*

(1) That the learned Judge has erred in decreeing the suit for specific performance filed by the plaintiff

(2) That the learned Judge ought to have dismissed the suit for specific performance filed by the plaintiff.

(3) That the learned Judge has erred in holding that the defendant had entered into an agreement to sell his bungalow to the plaintiff.

(4) That the learned Judge ought to have held that it was not proved by the plaintiff that the defendant had entered into an agreement of sale with him.

(5) That the learned Judge ought to have held that since no agreement was entered into between the parties, there was no question of showing readiness or willingness to perform the alleged contract at all.

(6) That the learned Judge has erred in holding that the plaintiff had paid Rs 1,00,000 to the defendant on 1 January 2001 as alleged by him.

(7) That the learned Judge ought to have held that the plaintiff did not pay Rs 1,00,000 or any part thereof to the defendant on 1 January 2001 or on any day.

(8) That the learned Judge has erred in holding that the plaintiff tendered Rs 9,00,000 to the defendant on 1 June 2001 as alleged by him.

(9) That the learned Judge ought to have held that the plaintiff did not tender Rs 9,00,000 or any part thereof on 1 June 2001 or on any day to the defendant as alleged.

(10) That the learned Judge has erred in holding that the defendant had committed breach of contract as alleged by the plaintiff.

(11) That the learned Judge ought to have held that when the plaintiff did not enter into an agreement with the defendant, there was no question of breach of contract by him.

(12) That the learned Judge has erred in ordering the defendant to execute a sale deed in favour of the plaintiff.

(13) That the learned Judge ought not to have granted specific performance of the contract by ordering the defendant to execute a sale deed in favour of the plaintiff.

(14) That the judgment and decree passed by the learned Judge is otherwise also contrary to law, against the weight of evidence and against the principles of justice, equity and good conscience.

4. The appellant, therefore, prays that the decree passed by the learned Judge in Civil Suit No. 100 of 2002 may kindly be set aside and the suit filed by the plaintiff may be dismissed with costs.

AND FOR THIS ACT OF KINDNESS, THE APPELLANT SHALL AS IN DUTY-BOUND FOREVER PRAY.

Ahmedabad,

7 February 2003.

ABC

*Advocate for the Appellant*

## APPENDIX E

### Second Appeal

*In the High Court of Gujarat, at Ahmedabad,  
District Jamnagar  
Second Appeal No. 34 of 2003*

Kantilal Chandulal Thaker, 17, Panchsheel ... Appellant  
Society, Bedibunder Road, Jamnagar (Ori. Defendant);

*Versus*

A.P. Sinha and/or his successor in office, ... Respondent  
Collector, Jamnagar, District, Jamnagar (Ori. Plaintiff).

Appeal under Section 100 of the Code of Civil Procedure, 1908  
Claim: Rs 300

The appellant abovenamed most respectfully states as under:

1. That the plaintiff-appellant filed a suit in the Court of the Civil Judge (S.D.), Jamnagar, being Regular Civil Suit No. 165 of 2000 against the defendant-respondent for a declaration that the order terminating the services of the plaintiff passed by the defendant on 25 June 2000 was illegal, *ultra vires*, discriminatory, contrary to law, penal in nature and therefore inoperative and for permanent injunction restraining the defendant and/or his servants, agents or nominees from implementing or executing the said order and also for an order directing the defendant to reinstate the plaintiff in service with full back wages and other consequential benefits.

2. That the learned Judge, by his judgment and decree, dated 15 July 2001 dismissed the said suit filed by the plaintiff holding that since the plaintiff was a temporary servant, he had no right to hold the post, and the defendant had power to terminate his services, and the order was, therefore, legal and valid.

3. That being aggrieved by the decree passed by the trial court, the appellant-plaintiff preferred an appeal in the Court of the District Judge, Jamnagar, being Civil Regular Appeal No. 198 of 2001.

4. That the learned District Judge, by his judgment and decree, dated 27 December 2002 dismissed the said appeal filed by the appellant and confirmed the decree of the trial court.

5. That being aggrieved by the decree passed by the trial court and confirmed by the lower appellate court, the appellant abovenamed begs to prefer this appeal to this Hon'ble Court. In this second appeal, among others, the following substantial questions of law arise for the determination of this Hon'ble Court:<sup>1</sup>

- (i) Whether in the facts and circumstances of the case, the courts below have committed an error of law in dismissing the suit filed by the plaintiff?<sup>2</sup>
- (ii) Whether in the facts and circumstances of the case, the courts below have committed an error of law in holding that the order terminating the services of the plaintiff was legal and valid?
- (iii) Whether in the facts and circumstances of the case, the courts below have committed an error of law in holding that the plaintiff was merely a temporary employee and had no right to hold the post?
- (iv) Whether in the facts and circumstances of the case, the courts below have committed an error of law in holding that the order terminating the services of the plaintiff was not punitive in nature?
- (v) Whether in the facts and circumstances of the case, the courts below have committed an error of law in holding that the plaintiff was not entitled to invoke protection of Article 311(2) of the Constitution of India?

6. On the grounds stated above, and on the grounds which may be urged at the time of hearing, it is prayed that this appeal may be allowed, the decree passed by the Civil Judge (S.D.), Jamnagar in Regular Civil Suit No. 165 of 2000 and confirmed by the District Judge, Jamnagar in Civil Regular Appeal No. 198 of 2001 may be set aside and the suit of the plaintiff be decreed with costs all throughout.

AND FOR THIS ACT OF KINDNESS, THE APPELLANT SHALL AS IN DUTY-BOUND FOREVER PRAY.

Ahmedabad,

31 February 2003.

ABC

*Advocate for the Appellant*

- 1 After the Amendment Act of 1976 in the Code of Civil Procedure, now second appeal can be filed only on the ground of "substantial question of law" (*See supra*, Pt. III, Chap. 3).
- 2 Strictly speaking, this cannot be said to be a "substantial question of law", but normally, in the Memorandum of Second Appeal, such question is raised by Advocates, (*See supra*, Pt. III, Chap. 3).

## APPENDIX F

### Revision

*In the High Court of Gujarat, at Ahmedabad,  
District Junagadh  
Civil Revision Application No. 76 of 2003*

Ratilal Mohanlal Thakker, Near Plaza .. Petitioner  
Talkies, Mahatma Gandhi Road, Porbandar (Ori. Defendant);

*Versus*

Ramaben Ramshanker Dave, Mahendra .. Opponent  
Mansion Near Kamla Nehru Park, Porbandar (Ori. Defendant).

Civil Revision Application under Section 115 of the  
Code of Civil Procedure, 1908  
Claim: Rs 360

The petitioner abovenamed most respectfully submits as under:

1. That the petitioner-plaintiff filed a suit in the Court of the Civil Judge (J.D.), Porbandar, being Regular Civil Suit No. 34 of 2001 against the opponent-defendant for possession of the suit-premises on the grounds of non-payment of rent and reasonable and *bona fide* requirement of the landlord.

2. That during the pendency of the said suit, the plaintiff made an application, Ext. 67, under the provisions of Order 6 Rule 17 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code"), on 5 November 2002 praying therein for the amendment of the plaint and claimed relief of possession of the suit premises on two additional grounds; viz. (i) the defendant had made permanent structure on the suit premises without the prior permission of the landlord; and (ii) the defendant was causing nuisance and annoyance to the landlord and to other tenants and neighbours.

3. That the learned Judge, after hearing both the parties rejected the said application by an order, below Ext. 67, on 27 January 2003, holding

that the amendment sought was not necessary for the purpose of determining the real question in controversy between the parties; that there was delay in making the application; that the proposed amendment would change the nature of the suit; and that if such amendment were granted, it would cause great prejudice to the other side.

4. That being aggrieved by the said order, below Ext. 67, the petitioner herein approaches this Hon'ble Court by filing the present revision application on the following, among other grounds:

*Grounds*

(1) That the learned Judge has erred in rejecting the application, Ext. 67, filed by the plaintiff.

(2) That the learned Judge ought to have granted the application, Ext. 67, filed by the plaintiff.

(3) That the learned Judge has erred in holding that the proposed amendment was not necessary for the purpose of determining the real question in controversy between the parties.

(4) That the learned Judge ought to have held that the proposed amendment was necessary for the purpose of determining the real question in controversy between the parties.

(5) That the learned Judge has erred in holding that there was delay on the part of the plaintiff in making the application, Ext. 67.

(6) That the learned Judge ought to have held that there was no delay on the part of the plaintiff in making the application for amendment.

(7) That the learned Judge ought to have appreciated the fact that both the grounds mentioned in the application for amendment, Ext. 67, had arisen after the filing of the suit and, therefore, they could not have been included in the plaint.

(8) That the learned Judge has erred in holding that the proposed amendment would change the nature of the suit.

(9) That the learned Judge ought to have held that the proposed amendment would not change the nature of the suit inasmuch as the suit was for possession of the suit premises and even after the proposed amendment the nature of the suit and the relief claimed would remain the same.

(10) That the learned Judge ought to have appreciated the material fact that by addition of some grounds for possession of the suit premises, the nature of the suit can never be changed.

(11) That the learned Judge has erred in not considering the fact that the proposed amendment was necessary to avoid multiplicity of suits.

(12) That the learned Judge ought to have appreciated the fact that the proposed amendment would not cause injustice to the defendant and, therefore, ought to have exercised the discretion by granting it.

(13) That the learned Judge ought to have construed the provisions relating to amendment of pleading liberally and ought to have granted the application for amendment.

(14) That the learned Judge in rejecting the application for amendment has acted in breach of the provisions embodied in Order 6 Rule 17 of the Code and thereby acted illegally and with material irregularity.<sup>1</sup>

(15) That had the order been made in favour of the petitioner, it would have finally disposed of the suit (or other proceedings).<sup>2</sup>

(16) That even otherwise also, the order, passed by the learned Judge, is illegal, erroneous, against the principles of justice, equity and good conscience and at the same requires to be quashed and set aside.

5. On the grounds stated above, and on the grounds which may be urged at the time of hearing, it is prayed—

- (a) that this revision application may kindly be allowed and the order, below Ext. 67, dated 27 January 2003 passed by the Civil Judge (J.D.), Porbandar in Regular Civil Suit No. 34 of 2001 may be set aside and the application for amendment may be allowed;
- (b) that pending hearing and final disposal of this revision application, further proceedings in Regular Civil Suit No. 34 of 2001 pending in the court of the Civil Judge (J.D.), Porbandar may kindly be stayed;
- (c) that any other relief which this Hon'ble Court thinks fit, may also be granted.

AND FOR THIS ACT OF KINDNESS, THE PETITIONER SHALL AS IN DUTY-BOUND FOREVER PRAY.

Ahmedabad,

ABC

7 February 2003.

*Advocate for the Petitioner*

*Affidavit*

I, *Ratilal Mohanlal Thakker*, petitioner herein, do state on solemn affirmation that what is stated above is true to my information and belief and I believe the same to be true.

.....

(Deponent)

1. To invoke jurisdiction of a High Court, the case must fall in any of the cls (a), (b) or (c) of S. 115 of the Code (See *supra*, Pt. III, Chap. 9)
2. After the Amendment Act of 1999 in the Code of Civil Procedure, revision is maintainable only if the condition laid down in the proviso is satisfied (See *supra*, Pt. III, Chap. 9)

## APPENDIX G

### Injunction Application

*In the City Civil Court at Ahmedabad  
Civil Suit No. 100 of 2002*

Rajnikant Ramprasad Pandya, Hindu, Adult, . . . Plaintiff;  
aged about 50 years, residing at 15, Paradise Park,  
Usmanpura, Ahmedabad

*Versus*

Ramanbhai Mohanbhai Patel, Hindu Adult, aged . . . Defendant.  
about 55 years, residing at 35, Patidar Society, Paldi,  
Ahmedabad

The plaintiff abovenamed humbly states as under:

1. That by an agreement in writing, dated 1 January 2001, signed by the defendant, the defendant contracted to sell to the plaintiff his bungalow referred to in the said agreement (hereinafter referred to as "the suit property") for Rs 10,00,000. An amount of Rs 1,00,000 was paid by the plaintiff to the defendant as earnest money at the time of agreement.

2. The plaintiff was and is ready and willing to perform his part of the contract but the defendant has refused to execute a sale deed and thus has failed to perform his part of the contract.

3. The plaintiff has filed the above suit against the defendant for specific performance of the contract, which is pending in this Hon'ble Court. The plaintiff has a *prima facie* case and balance of convenience is also in his favour.

4. The plaintiff has come to know that the defendant is trying to dispose of the suit property and has contacted some parties for the said purpose. The plaintiff submits that if the defendant is not restrained from disposing of and/or in any manner transferring the suit property during the pendency of the suit, irreparable injury and loss would be caused to the plaintiff, which would not be compensated in terms of

money and the suit filed by him would become infructuous. It would also lead to multiplicity of proceedings.

5. The plaintiff, therefore, prays:

- (a) that during the pendency of and till the final disposal of Civil Suit No. 100 of 2002, the defendant and/or his servants, agents or nominees be restrained from selling, disposing of, assigning or in any way transferring the suit property to any person;
- (b) that any other relief which the Hon'ble Court deems fit in the facts and circumstances of the case may also be granted.

AND FOR THIS ACT OF KINDNESS, THE PLAINTIFF SHALL AS IN DUTY-BOUND FOREVER PRAY.

ABC

.....

*Plaintiff's Advocate*

*Plaintiff*

*Affidavit*

I, *Rajnikant Ramprasad Pandya*, the plaintiff abovenamed do solemnly declare that what is stated in paras 1 to 3 is true to my knowledge and that what is stated in para 4 is stated on the information received by me and I believe it to be true.

.....

*Plaintiff*

## APPENDIX H

### Affidavit

*In the City Civil Court at Ahmedabad*  
*Civil Suit No. 100 of 2002*

Rajnikant Ramprasad Pandya, Hindu, Adult, . . . Plaintiff;  
aged about 50 years, residing at 15, Paradise Park,  
Usmanpura, Ahmedabad

*Versus*

Ramanbhai Mohanbhai Patel, Hindu, Adult, aged . . . Defendant.  
about 55 years, residing at 35, Patidar Society, Paldi,  
Ahmedabad

#### *Application for adjournment*

I, *Rajnikant Ramprasad Pandya*, the deponent herein, do solemnly affirm and state on oath as under :—

1. That I am the plaintiff in the above suit. I am fully aware of and acquainted with the facts stated hereinbelow.
2. That the above suit is filed for hearing today. However, my advocate has suddenly taken ill. He is confined to bed and is unable to attend the Court.
3. That I came to know about the illness of my advocate when today in the morning I went to his Office in connection with the hearing of the suit.
4. That due to sudden illness and paucity of time it is not possible for me to engage another advocate and to apprise him with all the facts and circumstances of the case. He may not be able to do justice to my case.
5. That I was and am ready and willing to go on with the matter, but because of sudden illness of my advocate, I am unable to proceed with the case.

6. That in the facts and circumstances, it is in the interest of justice that the hearing may be adjourned to any other date.

I, Rajnikant Ramprasad Pandya, plaintiff herein, do state on oath the solemn affirmation that the facts stated in paras 1 to 6 are true to my personal knowledge. I have concealed nothing and no part of it is false. So I pray to Almighty God to help me.

.....

*Deponent*

# APPENDIX I

## Caveat

*In the High Court of Gujarat, at Ahmedabad*

*Caveat*

*in*

C.A. No. . . . .

of 2003

*in*

F.A. No. . . . .

of 2003

Rajnikant Ramprasad Pandya,  
15, Paradise Park,  
Usmanpura,  
Ahmedabad

.. Caveator  
(Ori. Plaintiff);

*Versus*

Ramanbhai Mohanbhai Patel,  
35, Patidar Society,  
Paldi, Ahmedabad

.. Opponent  
(Ori. Plaintiff).

Caveat under Section 148-A of the Code of Civil  
Procedure, 1908

The Caveator abovenamed most respectfully states as under:

1. That the Caveator-original plaintiff filed a suit in the City Civil Court at Ahmedabad being Civil Suit No. 100 of 2002 against the opponent-original defendant for specific performance of the contract entered into by him with the opponent. In the alternative, the caveator prayed for damages of Rs 10,00,000 from the opponent alleging that the opponent had committed breach of contract.

2. That the learned Judge, by his judgment dated 13 January 2003, decreed the suit filed by the caveator-original plaintiff for specific

performance of the contract and ordered the opponent to execute a sale deed in favour of the caveator.

3. That being aggrieved by the decree passed by the trial court, the opponent-defendant is likely to institute first appeal in this Hon'ble Court and also expected to apply for stay of decree passed against him.

4. That as the Caveator has obtained a decree in his favour, he has a right to appear before this Hon'ble Court and to oppose stay of decree passed by the trial court.

5. The Caveator, therefore, prays that let nothing be done in the matter and no stay and/or interim relief be granted in favour of the opponent by this Hon'ble Court without serving a notice of such appeal/application for stay upon the caveator and without hearing him.

6. The Caveator's address for service of notice of appeal/application for stay is as mentioned in the cause title of this Caveat.

7. The Caveator has sent a notice of this caveat by registered post, acknowledgement due to the opponent. A copy of postal slip is annexed to this caveat.

AND FOR THIS ACT OF KINDNESS, THE CAVEATOR SHALL AS IN DUTY-BOUND FOREVER PRAY.

Ahmedabad,  
15 January 2003.

ABC  
*Advocate for the Caveator*

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